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SUPREME COURT, U.S.

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Nos. 05-547 and 05-7664

In the Supreme Court of the United States

JOSE ANTONIO LOPEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

REYMUNDO TOLEDO-FLORES

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND EIGHTH CIRCUITS

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

The Immigration and Nationality Act attaches a variety of consequences to an alien's commission of an "aggravated felony." That Act defines "aggravated felony" to include "a drug trafficking crime (as defined in section 924(c) of title 18)"—which, in turn, defines the phrase to mean "any felony punishable under the Controlled Substances Act" (18 U.S.C. 924(c)(2))—"whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004). The federal Sentencing Guidelines adopt that same definition of "aggravated felony." U.S.S.G. § 2L1.2(b)(1)(C) and comment. (n.3(A)). The question presented is:

Whether a state conviction for a controlled substance offense that is a felony under state law, and that is punishable under the Controlled Substances Act, albeit generally as a misdemeanor, qualifies as an "aggravated felony" under the Immigration and Nationality Act.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Summary of argument 8
Argument:

I. Petitioner Toledo-Flores's case is moot 10

II. A state-law drug crime that is both a felony and punishable under the Controlled Substances Act is an "aggravated felony," regardless of whether it is also a felony under federal law 13

A. The statutory definition of "aggravated felony" encompasses large categories of criminal conduct under state law, without requiring a federal-law parallel 14

B. The incorporating language in 8 U.S.C. 1101(a)(43) eliminates any requirement that the conviction be for a felony under federal law 15

C. The plain meaning of "any felony punishable under the Controlled Substances Act" in 18 U.S.C. 924(c)(2) includes state-law convictions 17

D. A state-law felony offense is a drug-trafficking crime even if it is not hypothetically a federal felony 23

TABLE OF CONTENTS—Continued: Page

1. The phrase "punishable under the Controlled Substances Act" substantively describes the qualifying criminal conduct 24

2. "Felony" means a crime punishable by the convicting jurisdiction by more than one year in prison 25

a. "Felony" refers to the length of the authorized sentence 25

b. "Felony" status depends on the sentence authorized by the convicting jurisdiction 28

E. The incorporation of "drug trafficking crime" into 8 U.S.C. 1101(a)(43)(B) ensures that certain possession offenses can be "aggravated felonies" 36

F. The legislative history does not support petitioners 40

G. Including state felonies is consistent with both principles of uniformity and the rule of lenity 43

Conclusion 49

Appendix A 1a

Appendix B 12a

TABLE OF AUTHORITIES

Page

Cases:

Adams v. *United States ex rel. McCann*, 317 U.S. 269 (1942) 25
Aguirre v. *INS*, 79 F.3d 315 (2d Cir. 1996) 44
Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 20
American Surety Co. v. *Marotta*, 287 U.S. 513 (1933) 36
Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 10
Arlington Cent. Sch. Dist. Bd. Of Educ. v. *Murphy*, 126 S. Ct. 2455 (2006) 40
Barrett, In re, 20 I. & N. Dec. 171 (B.I.A. 1990) 16, 38, 41
Bennett v. *Spear*, 520 U.S. 154 (1997) 37
Bowen v. *Michigan Acad. of Family Physicians*, 476 U.S. 667 (1986) 31
Callanan v. *United States*, 364 U.S. 587 (1961) 48
Castillo-Zapata, In re, No. A 37 837 447 (Immig. Ct. June 4, 2004) 34
Cazarez-Gutierrez v. *Ashcroft*, 382 F.3d 905 (9th Cir. 2004) 44
City of Erie v. *Pap's A.M.*, 529 U.S. 277 (2000) 10
Commissioner v. *Bilder*, 369 U.S. 499 (1962) 40
Custis v. *United States*, 511 U.S. 485 (1994) 19
Dickerson v. *New Banner Inst., Inc.*, 460 U.S. 103 (1983) 17

Cases–Continued: Page

Doe v. *Chao*, 540 U.S. 614 (2004) 37
Francis v. *Reno*, 269 F.3d 162 (3d Cir. 2001) 30
Gerbier v. *Holmes*, 280 F.3d 297 (3d Cir. 2002) . *passim*
Gonzales v. *Raich*, 125 S. Ct. 2195 (2005) 38, 39
Gonzales-Gomez v. *Achim*, 441 F.3d 532 (7th Cir. 2006) 44
Gozlon-Peretz v. *United States*, 498 U.S. 395 (1991) .. 49
Green Tree Fin. Corp.-Ala. v. *Randolph*, 531 U.S. 79 (2000) 27
Harmelin v. *Michigan*, 501 U.S. 957 (1991) 38
Holmes v. *Jennison*, 39 U.S. (14 Pet.) 540 (1840) 47
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 33
INS v. *St. Cyr*, 533 U.S. 289 (2001) 14
Jago v. *Van Curen*, 454 U.S. 14 (1981) 12
Jenkins v. *INS*, 32 F.3d 11 (2d Cir. 1994) 44
Jerome v. *United States*, 318 U.S. 101 (1943) 22, 25
Jobson v. *Ashcroft*, 326 F.3d 367 (2d Cir. 2003) 30
Johnson v. *Pettiford*, 442 F.3d 917 (5th Cir. 2006) ... 12
K Mart Corp. v. *Cartier, Inc.*, 486 U.S. 281 (1988) ... 33
L-G-, In re, 21 I. & N. Dec. 89 (B.I.A. 1995), withdrawn in part, *In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002) 32
Lane v. *Williams*, 455 U.S. 624 (1982) 13
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 14, 30
Lewis v. *United States*, 445 U.S. 55 (1980) 19
Muscarello v. *United States*, 524 U.S. 125 (1998) 48

Cases–Continued: Page

National Treasury Employees Union v. *Von Raab*, 489 U.S. 656 (1989) 38
Nye & Nissen v. *United States*, 336 U.S. 613 (1949) 24
O'Shea v. *Littleton*, 414 U.S. 488 (1974) 13
Ortiz v. *INS*, 179 F.3d 1148 (9th Cir. 1999) 28
Price v. *United States*, 537 U.S. 1152 (2003) 33
Railway Labor Executive's Ass'n v. *Gibbons*, 455 U.S. 457 (1982) 47
Ratzlaf v. *United States*, 510 U.S. 135 (1994) 40
Russello v. *United States*, 464 U.S. 16 (1983) 18
Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 17
Shalala v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) 31
Shepard v. *United States*, 544 U.S. 13 (2005) 46
Small v. *United States*, 544 U.S. 385 (2005) 27
Smith v. *United States*, 508 U.S. 223 (1993) 25, 29, 30, 49
Spencer v. *Kemna*, 523 U.S. 1 (1998) 11, 13
State v. *Basurto*, 501 P.2d 970 (Az. Ct. App. 1972) ... 34
State v. *Goodnight*, 370 N.E. 2d 486 (Ohio Ct. App. 1977) 35
State v. *Williams*, 471 So. 2d 255 (La. Ct. App.), writ denied, 475 So. 2d 1102 (1985) 34
Steele v. *Blackman*, 236 F.3d 130 (3d Cir. 2001) 33
Taylor v. *United States*, 495 U.S. 575 (1990) 26
Toll v. *Moreno*, 458 U.S. 1 (1982) 47

Cases–Continued: Page

U.S. Term Limits, Inc. v. *Thornton*, 514 U.S. 779 (1995) 47
United States v. *Adkins*, 102 F.3d 111 (4th Cir. 1996), cert. denied, 522 U.S. 824 (1997) 28
United States v. *Amaya-Portillo*, 423 F.3d 427 (4th Cir. 2005) 29
United States v. *Anderson*, 39 F.3d 331 (D.C. Cir. 1994), vacated in part on reh'g en banc, 59 F.3d 1323 (D.C. Cir.), cert. denied, 516 U.S. 999 (1995) 18
United States v. *Briones-Mata*, 116 F.3d 308 (8th Cir. 1997) 6, 44
United States v. *Burston*, 159 F.3d 1328 (11th Cir. 1998) 26
United States v. *Cabrera-Sosa*, 81 F.3d 998 (10th Cir.), cert. denied, 519 U.S. 885 (1996) 44
United States v. *California*, 381 U.S. 139 (1965) 40
United States v. *Campos-Fuerte*, 357 F.3d 956 (9th Cir.), as amended, 366 F.3d 691 (9th Cir.), cert. denied, 543 U.S. 859 (2004) 30
United States v. *Gonzales*, 520 U.S. 1 (1997) 19, 22
United States v. *Graham*, 169 F.3d 787 (3d Cir.), cert. denied, 528 U.S. 845 (1999) 25
United States v. *Haskins*, 166 Fed. Appx. 76 (4th Cir. 2006) 39
United States v. *Hernandez-Avalos*, 251 F.3d 505 (5th Cir.), cert. denied, 534 U.S. 935 (2001) 7, 44
United States v. *Hernandez-Rodriguez*, 388 F.3d 779 (10th Cir. 2004) 30

Cases–Continued: Page

United States v. *Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997) 44

United States v. *Hopkins*, 310 F.3d 145 (4th Cir. 2002), cert. denied, 537 U.S. 1238 (2003) 20

United States v. *Ibarra-Galindo*, 206 F.3d 1337 (9th Cir. 2000), cert. denied, 531 U.S. 1102 (2001) 44

United States v. *Jackson*, 301 F.3d 59 (2d Cir. 2002), cert. denied, 539 U.S. 952 (2003) 30

United States v. *Johnson*, 529 U.S. 53 (2000) 11, 12

United States v. *Munoz-Fabela*, 896 F.2d 908 (5th Cir.), cert. denied, 498 U.S. 824 (1990) 18

United States v. *Page*, 84 F.3d 38 (1st Cir. 1996) 26

United States v. *Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005) 44

United States v. *Pornes-Garcia*, 171 F.3d 142 (2d Cir.), cert. denied, 528 U.S. 880 (1999) 43, 45

United States v. *Rangel*, 149 Fed. Appx. 254 (5th Cir. 2005) 39

United States v. *Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996) 29, 43

United States v. *Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002) 14, 25, 45

United States v. *Rodriguez*, 26 F.3d 4 (1st Cir. 1994) 43

United States v. *Rodriguez-Munoz*, No. 04-11321, 2006 WL 1209382 (5th Cir. May 2, 2006) 12

United States v. *Simon*, 168 F.3d 1271 (11th Cir.), cert. denied, 528 U.S. 844 (1999) 44

Cases–Continued: Page

United States v. *Simpson*, 319 F.3d 81 (2d Cir. 2002) 48
United States v. *Urias-Escobar*, 281 F.3d 165 (5th Cir.), cert. denied, 536 U.S. 913 (2002) 25
United States v. *Watts*, 519 U.S. 148 (1997) 20
United States v. *Wilson*, 316 F.3d 506 (4th Cir.), cert. denied, 538 U.S. 1025 (2003) 29, 31, 44
United States v. *Woods*, 233 F.3d 482 (7th Cir. 2000) 31
Vacchio v. *Ashcroft*, 404 F.3d 663 (2d Cir. 2005) 33
Varity Corp. v. *Howe*, 516 U.S. 489 (1996) 36
Yanez-Garcia, In re, 23 I. & N. Dec. 390 (B.I.A. 2002) 6, 32, 33, 45, 48

Constitution, Treaty, statutes, regulations and rules:

U.S. Const. Art. I, § 8, Cl. 4 (Uniformity Clause) 47
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10. 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19, 1465 U.N.T.S. 85 2
Anabolic Steroid Act of 2004, Pub. L. No. 108-358, § 2(a)(2), 118 Stat. 1663 (to be codified at 21 U.S.C. 802 (44)) 4
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181:
Preamble, 102 Stat. 4181 ..... 37, 42
§ 6212, 102 Stat. 4360 37

Statutes, regulations and rules—Continued: Page

§ 7342, 102 Stat. 4469 37
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, § 1005(a), 98 Stat. 2138 22
Controlled Substances Act, 21 U.S.C. 801 *et seq.* 4
21 U.S.C. 801(2) 38
21 U.S.C. 801(3) 38
21 U.S.C. 801(4) 38
21 U.S.C. 802(13) 4, 27, 28, 31
21 U.S.C. 802(44) 4, 26, 30, 31
21 U.S.C. 841(a) 46
21 U.S.C. 841(b)(1) (2000 & Supp. III 2003) 39
21 U.S.C. 843(a)(5) 36
21 U.S.C. 843(a)(6) 36
21 U.S.C. 844(a) 24, 33, 36, 41
21 U.S.C. 851(a)(1) 33
Foreign Narcotics Kingpin Designation Act, 21 U.S.C. 1901 *et seq.* 42
Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1224 22
Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978:
§ 501, 104 Stat. 5048 16
§ 602(a), 104 Stat. 5077 36
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(14) 37
8 U.S.C. 1101(a)(17) 37
8 U.S.C. 1101(a)(28) 37

Statutes, regulations and rules–Continued: Page

8 U.S.C. 1101(a)(36) 37
8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) ..... *passim*
8 U.S.C. 1101(a)(43)(A) 14, 15, 12a
8 U.S.C. 1101(a)(43)(B) ..... *passim*, 12a
8 U.S.C. 1101(a)(43)(C)-(F) 15, 12a
8 U.S.C. 1101(a)(43)(D) 15, 12a
8 U.S.C. 1101(a)(43)(F) 15, 30, 13a
8 U.S.C. 1101(a)(43)(G) 14, 15, 36, 13a
8 U.S.C. 1101(a)(43)(H)-(P) (2000 & Supp. IV 2004) 15, 13a
8 U.S.C. 1101(a)(43)(J) 14, 15, 13a
8 U.S.C. 1101(a)(43)(M) 15, 14a
8 U.S.C. 1101(a)(43)(P) 14, 38, 14a
8 U.S.C. 1101(a)(43)(P)-(T) 15, 14a
8 U.S.C. 1101(a) (43)(Q) 14, 38, 15a
8 U.S.C. 1101(a)(43)(R) 14, 15, 15a
8 U.S.C. 1101(a)(43)(S) 14, 15, 38, 15a
8 U.S.C. 1101(a)(43)(T) 38, 15a
8 U.S.C. 1101(a)(48)(A) 21
8 U.S.C. 1101(f)(8) 3, 21
8 U.S.C. 1158(b)(2)(A)(ii) 2
8 U.S.C. 1158(b)(2)(B)(i) 2, 21
8 U.S.C. 1182(a)(9)(A)(i) 3, 21
8 U.S.C. 1182(a)(9)(A)(ii) 3, 21
8 U.S.C. 1227(a)(2)(A)(iii) 2, 21, 35
8 U.S.C. 1227(a)(2)(B)(i) 2, 35

Statutes, regulations and rules–Continued: Page

8 U.S.C. 1229a(c)(3)(A) 20
8 U.S.C. 1229a(c)(3)(B) 20
8 U.S.C. 1229b(a)(3) 2, 21
8 U.S.C. 1229b(b)(1)(C) 2, 21
8 U.S.C. 1229c(b)(1)(B) 3, 21
8 U.S.C. 1231(b)(3)(B) 21
8 U.S.C. 1231(b)(3)(B)(ii) 2
8 U.S.C. 1325 6
8 U.S.C. 1325(a) 3
8 U.S.C. 1326 3
8 U.S.C. 1326(a) 3
8 U.S.C. 1326(b) 12
8 U.S.C. 1326(b)(2) 3
8 U.S.C. 1357(d) 18
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, Ch. II, § 218(a)(1), 98 Stat. 2027 26
5 U.S.C. 7313(a) 30
5 U.S.C. 7371(a)(1) 30
5 U.S.C. 8148(b)(1) 30
6 U.S.C. 251 (Supp. IV 2004) 5
7 U.S.C. 12a(3)(H) 29
7 U.S.C. 499d(d) 30
7 U.S.C. 2024(b)(1) 26
7 U.S.C. 2024(c) 26
8 U.S.C. 1366(1) 30
8 U.S.C. 1366(2) 30
12 U.S.C. 3420(b)(1)(A) 18
18 U.S.C. 1(1) (1982) 26

Statutes, regulations and rules–Continued: Page

18 U.S.C. 2(a) 24
18 U.S.C. 16 30
18 U.S.C. 16(b) 30
18 U.S.C. 521(c)(1) 19, 29
18 U.S.C. 521(c)(2) 19, 29
18 U.S.C. 751(a) 26
18 U.S.C. 922(g)(1) 26
18 U.S.C. 924 (2000 & Supp. III 2003) 18, 26
18 U.S.C. 924(c) ..... *passim*
18 U.S.C. 924(c)(1) 21, 22, 30
18 U.S.C. 924(c)(1)(A) 21
18 U.S.C. 924(c)(2) (Supp. V 1987) 40
18 U.S.C. 924(c)(2) ..... *passim*
18 U.S.C. 924(c)(3) 22
18 U.S.C. 924(e) 19, 31
18 U.S.C. 924(e)(2)(A)(i) 18
18 U.S.C. 924(e)(2)(A)(ii) 18
18 U.S.C. 924(e)(2)(B) 26
18 U.S.C. 924(e)(2)(B)(ii) 27
18 U.S.C. 924(g) 23
18 U.S.C. 924(g)(2)-(3) 23
18 U.S.C. 1956(c)(7)(D) (Supp. III 2003) 18
18 U.S.C. 2118 42
18 U.S.C. 2251(e) (Supp. III 2003) 18
18 U.S.C. 3156(a)(3) 26
18 U.S.C. 3559 (2000 & Supp. III 2003) 4, 26

Statutes, regulations and rules–Continued: Page

18 U.S.C. 3559(a) 26
18 U.S.C. 3583(b)(3) 11
18 U.S.C. 3583(e)(1) (2000 & Supp. III 2003) 12
18 U.S.C. 3583(e)(2) (2000 & Supp. III 2003) 12
18 U.S.C. 3592(c)(2) 26
21 U.S.C. 862a(a) 30
21 U.S.C. 955 ..... 36, 41
22 U.S.C. 2714(e)(3) 26
23 U.S.C. 159(a)(3)(A)(i)(I) 18
28 U.S.C. 540A(a) 30
28 U.S.C. 540A(c)(1) 26
29 U.S.C. 186(d)(1) 26
29 U.S.C. 186(d)(2) 26
29 U.S.C. 1111(a) 30
38 U.S.C. 5313(a)(1) 30
38 U.S.C. 5313(b)(3) 30
38 U.S.C. 5313B(b)(1)(A) (Supp. III 2003) 30
42 U.S.C. 402(d)(7)(A) 30
42 U.S.C. 423(d)(6)(A) 30
42 U.S.C. 423(d)(6)(B) 30
42 U.S.C. 608(a)(9)(A)(i) 30
42 U.S.C. 1004(a)(2) 30
42 U.S.C. 1382(e)(1)(J)(4)(A) 30
42 U.S.C. 1437f(d)(1)(B)(v)(I) 30
42 U.S.C. 1437z(2)(A)(i) 30
49 U.S.C. 31301(9) 26

Statutes, regulations and rules–Continued: Page

49 U.S.C. 44936(b)(1)(B)(xiv)(IX) (Supp. III 2003) ... 26
Ala. Code (2005):
§ 13A-1-2(8) ... 26
§ 13A-12-202 ... 23
Alaska Stat. (LexisNexis 2004):
§ 11.71.040(a)(3)(G) ... 35
§ 11.71.040(a)(4) (Supp. 2005) ... 23
§ 11.71.040(d) ... 35
§ 11.81.900(a)(24) (Supp. 2005) ... 26
Ark. Code Ann. (LexisNexis 2006):
§ 5-4-401 ... 26
§ 5-64-101(18)(B) (2005) ... 33
§ 5-64-411 (2005) ... 23
Cal. Health & Safety Code (West Supp. 2006):
§ 11379 ... 23
§ 11532 ... 23
Cal. Penal Code (West 1999):
§ 17 ... 26
§ 19.2 ... 26
§ 653f(d) ... 23
Conn. Gen. Stat. (2003):
§ 21a-279(d) ... 23
§ 53a-25 ... 26
Del. Code Ann.:
title 11 (2001 & Supp. 2004):
§ 233 ... 26

Statutes, regulations and rules–Continued: Page

§§ 4205-4206 26
title 16 (2003 & Supp. 2004):
§ 4753A(a) 34
§ 4753A(e) 34
Fla. Stat. (2001):
§ 775.08 26
§ 893.13(6)(a) 35
§ 893.13(6)(b) 35
Ga. Code Ann. § 16-1-3(5) (2003) 26
Haw. Rev. Stat. (1993):
§ 701-107(2) 26
§ 712-1248 42
Idaho Code Ann.:
§§ 18-111 to 18-113 (2004 & Supp. 2005) 27
§ 37-2701(t)(4) (2002) 33
§ 37-2707(a) (2002) 33
§ 37-2707(b)(4) (2002) 33
Ind. Code Ann. § 35-50-2-1 (Lexis Nexis 2004) 26
Kan. Stat. Ann. (1995 & Supp. 2004):
§ 21-3105 27
§§ 21-4501 to 21-4502 27
§ 65-4107(a) (1992) 34
§ 65-4107(b) (1992) 34
§ 65-4127e(a) (1992) 34
§ 65-4127e(b) (1992) 34

Statutes, regulations and rules–Continued: Page

La. Rev. Stat. Ann. (West Supp. 2006):
§ 14:2(4) 27
§ 40:966(F) 35
Me. Rev. Stat. Ann. title 17-A (2006):
§ 1107-A(1) (A)-(B) 35
§ 1252 ..... 28, 35
Mich. Comp. Laws Ann. § 761.1(g) (West 2000) 27
Minn. Stat. Ann. § 609.02(2) (West Supp. 2006) 27
Miss. Code Ann. (West):
§ 1-3-11 (1989) 27
§ 41-29-105(s)(4) (Supp. 2005) 34
§ 41-29-115(A)(a)(4) (Supp. 2005) 34
§ 41-29-139(c)(2)(D)-(G) (Supp. 2005) 35
Mo. Rev. Stat. (2000):
§ 195.025 23
§ 195.213 23
§ 556.016(2) 27
Neb. Rev. Stat. (Supp. 2004):
§ 28-105 27
§ 28-106 27
Nev. Rev. Stat. (2005):
§ 453.333 23
§ 453.336(4) 35
§ 453.3395(1) 35
N.H. Rev. Stat. Ann. § 625:9(III) (Supp. 2005) 27
N.J. Stat. Ann. § 2C:1-4 (2005) 28

Statutes, regulations and rules–Continued: Page

N.Y. Penal Law § 10.00(5) (2004) 27
N.D. Cent. Code:
§ 12.1-32-01 (1997) 27
§ 19-03.1-23(6) (Supp. 2005) 36
Ohio Rev. Code Ann. (LexisNexis 2006):
§ 2901.02 27
§ 2925.(11)(C) 34
Okla. Stat. title 21 (2001):
§§ 5-6 27
§ 10 27
Or. Rev. Stat. (2005):
§ 161.525 27
§ 475.864(2) 36
§ 475.864(3) 36
R.I. Gen. Laws § 11-1-2 (2002) 27
S.D. Codified Laws (West Supp. 2006):
§ 22-1-4 27
§ 22-3-3 (Michie 1988) 5
§ 22-3-3 5
§ 22-6-1(7) (Michie 1998 & Supp. 1997) 5, 28
§ 22-6-2 (2004) 27
§ 22-42-5 (Michie 1988) 5, 28
§ 34-20B-1(13) (2004) 33
§ 34-20B-16(2) (2004) 33
Tex. Health & Safety Code Ann. (West 2003):
§ 481.102 (Supp. 2006) 7, 28

Statutes, regulations and rules–Continued: Page

§ 481.115 ..... 7, 28
§ 481.121(a)(5) 35
§ 481.121(b) 35
Tex. Penal Code Ann. (West 2003):
§ 1.07(23) (Supp. 2006) 27
§§ 12.21-12.23 27
§ 12.35 ..... 7, 28
Utah Code Ann. (2003):
§ 76-3-102 27
§ 76-3-204 27
Va. Code Ann. (LexisNexis 2004):
§ 18-2-8 27
§ 18-2-10 27
Wash. Rev. Code Ann. (West Supp. 2006):
§ 9A.04.040(2) (2000) 27
§ 69.50.4013 35
§ 69.50.4014 35
W. Va. Code Ann. § 61-11-1 (LexisNexis 2005) 27
Wyo. Stat. Ann. § 6-10-101 (LexisNexis 2005) 27
8 C.F.R.:
Section 208.16(d)(2)-(3) 2
Section 1208.16(d)(2)-(3) 2
Section 1240.8(d) 20
28 C.F.R. 76.2 39
Fed. R. Evid. 609(a)(1) advisory committee's note 26

Rules–Continued: Page

U.S. Sentencing Guidelines:

§ 2L1.2:

comment. (n.2) 26

comment. (n.3(A)) 3

§ 2L1.2(b)(1)(C) 3, 7, 21

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Miscellaneous:

134 Cong. Rec. (1988):

pp. 32,633-32,634 42

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p. 32,652 43

p. 32,695 41

Criminal Aliens: Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 101st Cong., 1st Sess. (1989) 43

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Miscellaneous—Continued: Page

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In the Supreme Court of the United States

No. 05-547

JOSE ANTONIO LOPEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

No. 05-7664

REYMUNDO TOLEDO-FLORES

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTH AND EIGHTH CIRCUITS

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals in No. 05-547 (05-547 Pet. App. 1a-7a) is reported at 417 F.3d 934. The decisions of the Board of Immigration Appeals (05-547 Pet. App. 8a-9a) and of the immigration judge (05-547 Pet. App. 10a-20a) in that case are unreported. The opinion of the court of appeals in No. 05-7664 (05-7664 J.A. 20-21) is not published in the *Federal Reporter*, but is *reprinted in* 149 Fed. Appx. 241.

JURISDICTION

The court of appeals entered its judgment in No. 05-547 on August 9, 2005. The petition for a writ of certiorari was filed on October 31, 2005. The court of appeals entered its judg-

ment in No. 05-7664 on August 17, 2005. The petition for a writ of certiorari was filed on November 15, 2005. The Court granted certiorari in both cases on April 3, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in Appendix B, *infra*, and at 05-547 Pet. Br. App. 1a-11a.

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), an alien who is convicted of an "aggravated felony," as defined in 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), may be ordered removed from the United States, 8 U.S.C. 1227(a)(2)(A)(iii). An alien also may be removed if he is convicted of violating "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)," unless it was a "single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. 1227(a)(2)(B)(i).

Conviction of an "aggravated felony" limits the potential forms of relief from removal that are available to an alien. An aggravated felony conviction renders a lawful permanent resident ineligible to apply for cancellation of removal, 8 U.S.C. 1229b(a)(3) and (b)(1)(C), or the discretionary relief of asylum, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i). An aggravated felony conviction does not disqualify an alien from withholding of removal, unless the term of imprisonment was five years or more and thus was "a particularly serious crime." 8 U.S.C. 1231(b)(3)(B)(ii).[1]

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[1] An alien with an aggravated felony conviction may obtain deferral of removal, but not withholding of removal, under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19, 1465 U.N.T.S. 85. See 8 C.F.R. 208.16(d)(2)-(3), 1208.16(d)(2)-(3). Furthermore,

In addition, conviction of an aggravated felony can affect an illegal alien's sentence for a recidivist illegal entry offense. It is a federal crime for an alien to enter the United States without authorization or proper inspection, or by providing false or misleading information to federal officials. 8 U.S.C. 1325(a). The maximum term of imprisonment for a first offense is six months in prison, but is two years for subsequent offenses. *Ibid.*[2] The United States Sentencing Guidelines authorize an eight-level upward adjustment in a defendant's offense level for illegal entry if the defendant was convicted of an "aggravated felony" before a prior removal from the United States. See U.S.S.G. § 2L1.2(b)(1)(C). In so doing, the Sentencing Guidelines adopt the INA's definition of "aggravated felony." *Id.* § 2L1.2, comment. (n.3(A)).[3]

b. The INA defines an "aggravated felony" by reference to a list of twenty-one categories of criminal offenses. Any offense "described in" that definition, "whether in violation of Federal or State law," is an aggravated felony. 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence). Any such offense "in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years" is also an aggravated felony. *Ibid.*

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aliens convicted of an aggravated felony are barred from seeking readmission following removal, but that bar is subject to waiver by the Attorney General. 8 U.S.C. 1182(a)(9)(A)(i) and (ii). Such aliens are also precluded from establishing "good moral character," 8 U.S.C. 1101(f)(8), and thus from being granted voluntary departure, 8 U.S.C. 1229c(b)(1)(B).

[2] Illegal reentry following a prior removal is also a criminal offense under 8 U.S.C. 1326. The maximum sentence is two years, unless the prior removal was subsequent to a conviction for an aggravated felony, which raises the maximum sentence to 20 years of imprisonment, 18 U.S.C. 1326(a) and (b)(2).

[3] Because the Sentencing Guidelines simply incorporate the INA's definition of "aggravated felony," Section 1101(a)(43)'s meaning in immigration law applies equally to sentencing proceedings.

That definition of "aggravated felony" includes "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. 1101(a)(43)(B). Section 924(c)(2) of Title 18, in turn, defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)."[4]

Title 18 classifies a federal crime as a "felony" if "the maximum term of imprisonment authorized" exceeds one year. 18 U.S.C. 3559 (2000 & Supp. III 2003). The Controlled Substances Act, 21 U.S.C. 801 *et seq.*, defines "felony" generally as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. 802(13). That Act further defines a "felony drug offense" as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44), as amended by the Anabolic Steroid Act of 2004, Pub. L. No. 108-358, § 2(a)(2), 118 Stat. 1663.

2. Petitioner Lopez is a native and citizen of Mexico who entered the United States illegally, but subsequently adjusted his status to that of lawful permanent resident. 05-547 Pet. App. 1a-2a, 11a. In 1997, after being granted lawful permanent resident status, Lopez was indicted in a South Dakota state court on one count of possessing cocaine, one count of distributing cocaine, and one count of conspiracy to distribute cocaine. 05-547 J.A. 41-43. Lopez ultimately pleaded guilty to aiding and abetting the possession of cocaine. 05-547 Pet. App.

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[4] Because these cases involve offenses that are punishable under the Controlled Substances Act, this brief's recitation of Section 924(c)(2)'s definitional language generally omits the other two laws for the sake of brevity.

13a; 05-547 J.A. 31-32. Under South Dakota law, Lopez's aiding and abetting offense was a felony punishable by up to five years of imprisonment. See S.D. Codified Laws § 22-42-5 (Michie 1988); *id.* § 22-6-1(7) (1988 & Supp. 1997). Also under South Dakota law, a person found guilty of aiding and abetting an offense "is legally accountable[] as a principal to the crime." *Id.* § 22-3-3 (West Supp. 2006); see *id.* § 22-3-3 (Michie 1988). Lopez was sentenced to five years of imprisonment, of which he served 15 months. 05-547 Pet. App. 14a; 05-547 J.A. 32.

The Immigration and Naturalization Service subsequently charged Lopez with being subject to removal based on his conviction of a controlled substance offense and an aggravated felony. 05-547 Pet. App. 12a.[5] With respect to the circumstances of his offense, Lopez testified at his immigration hearing that he "knew where you could get drugs in Huron at that time," that "he referred [Juan] Valdez to someone who did sell drugs," that he "helped him out to obtain the drugs," and that he had received money from Valdez. *Id.* at 13a; Admin. Rec. 98; see *ibid.* (Lopez states that he was "involved in the sale of illegal drugs," but "[o]nly that [one] time").

An immigration judge sustained both charges of removability. 05-547 Pet. App. 10a-20a. The immigration judge ruled first (*id.* at 16a) that Lopez was removable based on the controlled substance violation, a charge that was "not disputed." Relying on controlling precedent from the Board of Immigration Appeals (Board), the immigration judge further ruled that Lopez's state felony controlled substance offense constituted an aggravated felony because it was a drug trafficking crime under 8 U.S.C. 1101(a)(43)(B). See 05-547 Pet. App. 16a (citing *In re Yanez-Garcia*, 23 I. & N. Dec. 390

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[5] The Immigration and Naturalization Service's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. IV 2004).

(B.I.A. 2002)). Finally, the immigration judge ruled that Lopez's conviction of an aggravated felony statutorily disqualified him from obtaining the discretionary relief of cancellation of removal. 05-547 Pet. App. 20a. The Board affirmed in a brief opinion. 05-547 Pet. App. 8a-9a.

The court of appeals affirmed. 05-547 Pet. App. 1a-7a. As relevant here, the court held that Lopez's felony conviction constituted an "aggravated felony." *Id.* at 4a. Following its prior decision in *United States* v. *Briones-Mata*, 116 F.3d 308 (8th Cir. 1997) (per curiam), the court held that the "plain language" of Section 1101(a)(43) and the criminal law provisions it incorporates establish that "any felony punishable under the Controlled Substances Act," "under either state or federal law," is an aggravated felony. 05-547 Pet. App. 4a. Because Lopez's conviction was for a felony offense and was for conduct that was independently punishable under the Controlled Substances Act, the court held that it qualified as an "aggravated felony" (*id.* at 5a), which rendered Lopez ineligible for cancellation of removal (*id.* at 7a).

On January 4, 2006, Lopez was removed to Mexico, and he continues to pursue his claim for cancellation of removal from there. See 05-547 Gov't Pet. Stage Br. 6 n.5.

3. Petitioner Toledo-Flores is a native and citizen of Mexico who entered the United States illegally in February 2004, and was charged with illegal entry under 8 U.S.C. 1325. See 05-7664 J.A. 12-13. Toledo-Flores's immigration record revealed 15 prior illegal entries, including two prior federal convictions for illegal entry. *Id.* at 5, 14, 16-17. In fact, he had remained in Mexico for only one week between a prior deportation and his illegal entry in February 2004. *Id.* at 12-13. Toledo-Flores also has an extensive record of criminal conduct in the United States. He has state-court convictions for criminal mischief, assault, and driving while intoxicated. 05-7664 J.A. 16. In April 2002, Toledo-Flores was convicted in Texas

state court of possessing less than one gram of cocaine. *Id.* at 21; 05-7664 Pet. Br. 3. Under Texas law, that offense is a felony punishable by up to two years of imprisonment. See Tex. Health & Safety Code Ann. § 481.102 (West Supp. 2006); *id.* § 481.115 (2003); Tex. Penal Code Ann. § 12.35 (West 2003). The Texas court sentenced Toledo-Flores to seven months of imprisonment. Gov't C.A. Br. 4.

In sentencing Toledo-Flores for his illegal entry offense, the district court applied the Sentencing Guidelines' eight-level enhancement for a prior conviction of an aggravated felony, U.S.S.G. § 2L1.2(b)(1)(C), based on Toledo-Flores's felony drug conviction in Texas. See 05-7664 J.A. 21. The court sentenced Toledo-Flores to two years of imprisonment, to be followed by one year of supervised release. *Id.* at 1.

The court of appeals affirmed. 05-7664 J.A. 20-21. The court held that Congress had made a "deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the [Controlled Substances Act]." *Id.* at 21 (quoting *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 510 (5th Cir.), cert. denied, 534 U.S. 935 (2001)). Applying Fifth Circuit precedent, the court explained that Toledo-Flores's "prior conviction for a state drug offense * * * qualif[ied] as an aggravated felony under U.S.S.G. § 2L1.2(b)(1)(C) [because] it is punishable under the Controlled Substances Act and it is punishable by more than a year of imprisonment under the applicable state law." *Id.* at 21.

Toledo-Flores completed the term of imprisonment under his federal sentence on April 21, 2006, and was removed to Mexico. He will remain on inactive supervised release until April 20, 2007.

SUMMARY OF ARGUMENT

I. Petitioner Toledo-Flores's case is moot. His sole challenge is to the aggravated-felony enhancement of his term of imprisonment. He has now completed that prison term and has been removed from the United States. Accordingly, a ruling in his favor would have no practical effect. While he remains on supervised release, his supervision is inactive, imposes no constraints on his liberty, and, in any event, would not be affected by a ruling that the aggravated-felony enhancement was in error.

II. The plain text of the relevant statutory provisions makes state-law controlled substance felonies "aggravated felonies" under the INA. The operative language directs that "any felony" that is "punishable under the Controlled Substances Act" is a "drug trafficking crime," and thus an aggravated felony, "whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43)(B) (incorporating 18 U.S.C. 924(c)(2)); 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence). "Any felony" naturally includes state-law felonies for conduct punishable under the Controlled Substances Act, given the INA's command that offenses be included "whether in violation of Federal or State law."

Petitioners, in fact, do not dispute that state-law felonies can be "drug trafficking crimes" for purposes of the INA's definition of "aggravated felony." Petitioners also do not dispute that possession and aiding and abetting possession of cocaine are offenses that are "punishable under the Controlled Substances Act." 18 U.S.C. 924(c)(2). Finally, petitioners agree that "felony" takes its meaning by reference to Title 18, where its established usage requires only that the offense be punished by more than one year in prison. Petitioners' convictions satisfy all of those prerequisites.

Petitioners, however, would add the requirement that a state-law drug felony also be punishable *as a felony* under federal law. That argument defies 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), which directs that an offense is an "aggravated felony," "whether in violation of Federal law *or* state law," as long as the conduct is punishable under the Controlled Substances Act (emphasis added). Further, Section 1101(a)(43)'s broad and varied coverage of state-law crimes forecloses any notion that Congress intended the aggravated felony provision to conform to a federal model for qualifying offenses or, more particularly, be limited to crimes that the federal government itself would punish as a federal felony.

Nor does petitioners' argument have any home in the text of 18 U.S.C. 924(c)(2). Congress consistently employs the ordinary term "felony" to mean that the convicting jurisdiction has authorized a prison sentence of more than one year. Petitioners cite no instance in which the status of a crime as a "felony" turns on how the offense conduct would be sentenced by a jurisdiction other than the jurisdiction of conviction.

Further, petitioners' hypothetical-federal-felony approach would produce serious inequities, because the aggravated felony designation would turn upon the happenstance of the extent to which a State's controlled substances law overlaps with the federal statutory and prosecutorial model. Under petitioners' scheme, the possession of anything more than a personal-use amount of marijuana in a State that, like the federal government, charges such an offense as possession with intent to distribute, would be an aggravated felony. But that same alien's possession of 2000 pounds of marijuana in a neighboring State, which happens to target trafficking by using a graduated scheme of increasingly severe penalties for "possession" offenses, would not be an aggravated felony, despite an authorized sentence of decades in prison. Nothing in statutory text,

congressional purpose, principles of uniformity, or the rule of lenity warrants injecting such arbitrariness into the statute.

ARGUMENT

I. PETITIONER TOLEDO-FLORES'S CASE IS MOOT

Petitioner Toledo-Flores sought this Court's review of an increase in his sentence for illegal entry under the federal Sentencing Guidelines. See 05-7664 Pet. i, 5-6, 9-17; 05-7664 Pet. Br. 4. Because Toledo-Flores has never sought any form of relief from removal, his conviction of an aggravated felony has never been contested or even legally relevant in the context of immigration proceedings. And his sole claim for relief throughout this direct appeal from his criminal conviction and sentence has been the effect of his aggravated felon designation on the length of his term of imprisonment.

Following this Court's grant of certiorari, Toledo-Flores completed the term of imprisonment that he challenges, and he has been removed from the United States. Removal rendered his remaining term of supervised release "inactive." App. A, *infra*, 7a. As a result, Toledo-Flores's case is now moot, and the Court should dismiss his petition for lack of jurisdiction.

"To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks and citations omitted). A case becomes moot when "the parties lack a legally cognizable interest in the outcome." *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 287 (2000) (citations omitted). Toledo-Flores now lacks any legally cognizable interest in the proper construction of "aggravated felony" under the Sentencing Guidelines. He has never challenged the merits of his conviction for illegal entry. The sole relief sought in his appeal and petition to this Court was a reduction in the length of his sentence of imprisonment.

But "[t]he [i]ncarceration that he incurred * * * is now over, and cannot be undone." *Spencer* v. *Kemna*, 523 U.S. 1, 8 (1998). Nor, as a removed alien, can Toledo-Flores establish any type of collateral consequence flowing from his now-completed sentence (as distinguished from his conviction) that is "adequate to meet Article III's injury-in-fact requirement." *Id.* at 14.

Toledo-Flores argues (Br. 5 n.3) that the case is not moot because he is still subject to a term of supervised release. That does not save this case from mootness for three reasons.

First, whatever the impact of the aggravated-felony enhancement on Toledo-Flores's completed term of imprisonment, he has never challenged the imposition of a term of supervised release, and he does not contend that the increase in his offense level had any effect on the length of his supervised release term. In fact, Section 3583(b)(3) of Title 18 authorizes a one-year term of supervised release for Toledo-Flores's illegal entry offense regardless of whether he was previously convicted of an aggravated felony. Furthermore, this Court has held unanimously that erroneously served prison time is not to be credited against a term of supervised release. *United States* v. *Johnson*, 529 U.S. 53, 57-60 (2000).

Second, reversal of the aggravated-felony increase in Toledo-Flores's offense level would not have any practical effect on the terms or conditions of his supervised release. Because Toledo-Flores is no longer in the United States, his supervision by the United States Probation Office is "inactive." App. A, *infra*, 7a. He is not presently under the jurisdiction, custody, or control of the United States Government. He has no obligation to report to any federal probation officials, and they are not monitoring or constraining his activities in any manner. As the district court explained, "[i]n reality, we cannot supervise you in another country." 05-7664 J.A. 8. "We call it supervised release, but we're not going to—we can't

supervise you." *Id.* at 19. The term of supervised release thus has no effect on Toledo-Flores's liberty and implicates no legally cognizable interest. There are no practical conditions on Toledo-Flores's release left for a district court to modify. See 18 U.S.C. 3583(e)(2) (2000 & Supp. III 2003); *Johnson*, 529 U.S. at 60. Nor can the district court shorten the term of supervised release, because that may be done only after the "expiration of one year of supervised release," 18 U.S.C. 3583(e)(1) (2000 & Supp. III 2003), and Toledo-Flores's entire term of supervised release is only one year.[6]

Third, the only lingering effect of Toledo-Flores's remaining few months of inactive supervised release is that, were he again to enter the United States illegally before his term expires, his supervised release would be reactivated and could be revoked, App. A, *infra*, 7a, and that new offense of illegal reentry could subject him to an enhanced sentence, see 8 U.S.C. 1326(b). But mootness principles are not designed to insulate a defendant in advance against the consequences of future crimes by permitting challenges to expired sentences or inoperative terms of supervision that implicate no current or ripe stake in the outcome of the case. Toledo-Flores himself is "able—and indeed required by law—to prevent" the adverse

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[6] For that reason, Toledo-Flores's reliance on *Johnson* v. *Pettiford*, 442 F.3d 917 (5th Cir. 2006), and *United States* v. *Rodriguez-Munoz*, No. 04-11321, 2006 WL 1209382, at *1, *3 (5th Cir. May 2, 2006), is misplaced. In both of those cases, the courts retained the power to modify the terms of supervised release because the individuals remained on active supervised release within the United States and were under the ongoing jurisdiction and control of federal probation officials. Contrast *Jago* v. *Van Curen*, 454 U.S. 14, 21 n.3 (1981) (release of an individual on parole did not render a case moot because he remained subject to parole "terms that significantly restrict his freedom"). In addition, because Rodriguez-Munoz was serving a three-year term of supervised release, the court had the power to shorten the term of supervised release after one year. See 18 U.S.C. 3583(e)(1) (2000 & Supp. III 2003); *Johnson*, 442 F.3d at 918; *Rodriguez-Munoz*, 2006 WL 1209382, at *1.

consequences he portends "from occurring." *Spencer*, 523 U.S. at 15 (quoting *Lane* v. *Williams*, 455 U.S. 624, 633 n.13 (1982)). Accordingly, "the case-or-controversy requirement [cannot be] satisfied by general assertions or inferences that in the course of [his] activities [Toledo-Flores] will be prosecuted for violating valid criminal laws." *O'Shea* v. *Littleton*, 414 U.S. 488, 497 (1974). The law "assume[s] that [Toledo-Flores] will conduct [his] activities within the law and so avoid prosecution and conviction." *Ibid.*

II. A STATE-LAW DRUG CRIME THAT IS BOTH A FELONY AND PUNISHABLE UNDER THE CONTROLLED SUBSTANCES ACT IS AN "AGGRAVATED FELONY," REGARDLESS OF WHETHER IT IS ALSO A FELONY UNDER FEDERAL LAW

Petitioners argue at length that the text of 18 U.S.C. 924(c)(2), standing alone, refers to federal felonies, and thus that any state-law conviction must also be a "hypothetical federal felony." *Gerbier* v. *Holmes*, 280 F.3d 297, 304 (3d Cir. 2002). That is wrong. It is also beside the point. Even if Section 924(c)(2) itself applied only to federal felonies, Congress eliminated that restriction for purposes of the Section's incorporation into the INA's "aggravated felony" provision. For purposes of 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), Congress directed that any offense "described in" the "aggravated felony" definition shall qualify without regard to "whether [it is] in violation of Federal or State law," or even foreign law. *Ibid.* (penultimate sentence).

Further, despite their emphasis on federal law, petitioners ultimately agree that Section 924(c)(2)'s definition, as incorporated into 8 U.S.C. 1101(a)(43)(B), includes state felony convictions—albeit a specialized subset of them—for purposes of according an offense "aggravated felony" status. But there is no basis in statutory text, established usage, legislative his-

tory, or purpose for arguing that Congress's use of the ordinary term "felony" in Section 924(c)(2) encompasses only federal felonies plus that subset of state felonies deemed by courts, in hypothetical application, to be sufficiently analogous to federal felonies. Rather, when Section 924(c)(2)'s definition is read in a straightforward and commonsense manner, it requires that the offense (i) must be a "felony" under the law of the convicting jurisdiction, and (ii) the underlying conduct must be "punishable under the Controlled Substances Act."

A. The Statutory Definition Of "Aggravated Felony" Encompasses Large Categories Of Criminal Conduct Under State Law, Without Requiring A Federal-Law Parallel

The term "aggravated felony" in the INA is a "term of art created by Congress to describe a class of offenses that subjects aliens * * * to certain disabilities." *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 902 (9th Cir. 2002); see H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. I, at 147 (1990) ("aggravated felony" is a "defined term"). The term's coverage is sweeping, encompassing more than 20 broad categories of criminal conduct. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 4 n.1 (2004). The list of qualifying offenses illustrates, moreover, that, despite the appellation, "aggravated felon[ies]" are not "a subset of felonies," and, in fact, "a misdemeanor can be an 'aggravated felony.'" *Robles-Rodriguez*, 281 F.3d at 903 (citing case examples); see, *e.g.*, 8 U.S.C. 1101(a)(43)(A), (G), (J), (P), (Q), (R) and (S) (including as "aggravated felon[ies]" a variety of child-molestation, theft, gambling, forgery, counterfeiting, failure-to-appear, bribery, vehicle trafficking, and obstruction of justice offenses); see generally *INS* v. *St. Cyr*, 533 U.S. 289, 295-297 & nn. 4, 6 (2001).

Congress defined some of the categories of qualifying offenses by reference to common names for crimes, such as mur-

der, rape, sexual abuse, theft, obstruction of justice, and forgery. See, *e.g.*, 8 U.S.C. 1101(a)(43)(A), (G), (R) and (S). For others, Congress referred to how a specified federal law "defined" or "described" the offense. See, *e.g.*, 8 U.S.C. 1101(a)(43)(C)-(F) and (H)-(P) (2000 & Supp. IV 2004). Congress specifically provided, however, that regardless of definitional format, a conviction for any "offense described in" Section 1101(a)(43) is an "aggravated felony," "whether [it was] in violation of Federal or State law," or "the law of a foreign country." 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence).

Congress thus focused the definition on categories of criminal convictions, without regard to the identity of the prosecuting authority. When Congress wanted to cull out from a particular offense category what it regarded as less serious crimes, Congress generally used as its benchmark neither the label attached to a crime nor the identity of the convicting jurisdiction (federal, state, or foreign), but rather the authorized term of imprisonment. See, *e.g.*, 8 U.S.C. 1101(a)(43)(F), (G), (J) and (P)-(T).[7]

B. The Incorporating Language In 8 U.S.C. 1101(a)(43) Eliminates Any Requirement That The Conviction Be For A Felony Under Federal Law

Whatever the meaning of 18 U.S.C. 924(c)(2) in isolation, Congress eliminated any arguable hypothetical-federal-felony requirement for purposes of Section 924(c)'s incorporation into the aggravated-felony provision of the INA. The INA provides, without qualification, that the definition of "aggravated felony" applies to a conviction for a drug trafficking crime described in Section 1101(a)(43)(B)—a felony based on conduct

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[7] For two financial crimes, Congress drew the line in terms of the dollar loss caused. 8 U.S.C. 1101(a)(43)(D) and (M).

that is punishable under the Controlled Substances Act—without regard to whether the offense was "in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence).

Indeed, as petitioners acknowledge (Lopez Br. 5; Toledo-Flores Br. 34-35), Congress added the "Federal or State law" language to the INA in 1990 "to end further litigation" and make clear that "drug trafficking * * * is an aggravated felony whether or not the conviction occurred in state or Federal court." H.R. Rep. No. 681, Pt. I, *supra*, at 147 (approving *In re Barrett*, 20 I. & N. Dec. 171 (B.I.A. 1990), which held that an alien's state-law drug trafficking crime rendered him an aggravated felon); see Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 5048.

To require federal-law confirmation that a state offense punishable by more than one year is a felony—that is, to require that the offense also be hypothetically not just punishable under federal law, but punishable as a felony under federal law—would not only ignore the statutory text added to Section 1101(a)(43) in 1990, but would also disregard the structure of the aggravated-felony definition. Section 1101(a)(43) encompasses more than 20 types of criminal conduct and directs that a conviction for any federal, state, or foreign offense "described in" those categories constitutes an aggravated felony. In none of those other categories does the statute make the inclusion of a state-law offense contingent on the crime's hypothetical treatment under federal law, even though federal law criminalizes some of the same conduct and coverage of those crimes (*i.e.*, prostitution, child pornography, fraud, sexual abuse, burglary, obstruction of justice) and the punishments imposed may vary significantly from State to State. Nor do petitioners cite anything in the text, structure, or legislative history of 8 U.S.C. 1101(a)(43)(B) in particular to suggest that Congress was uniquely distrustful of States' con-

trolled substance laws or particularly solicitous of aliens who violate the felony prohibitions in those laws.

C. The Plain Meaning of "Any Felony Punishable Under The Controlled Substances Act" In 18 U.S.C. 924(c)(2) Includes State-Law Convictions

1. Section 1101(a)(43) of Title 8 incorporates the definition of "drug trafficking crime" in 18 U.S.C. 924(c), and the ordinary meaning of Section 924(c)(2)'s text captures not only convictions for violating federal drug laws themselves, but also state-law felony convictions for conduct that would be "punishable" under those laws.

First, the plain meaning of "punishable under" the Controlled Substances Act is that the criminal *conduct* is susceptible to sanction under that federal law, not that a conviction for a federal crime was, in fact, obtained. The ordinary dictionary meaning of "punishable" is conduct that is "liable to" or "capable of being punished by law."[8] The courts of appeals likewise have uniformly held that Section 924(c) does not require a separate conviction of the predicate crime, but rather requires only that commission of the crime be proved in establishing

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[8] *Webster's Third New International Dictionary* 1843 (1986); see *Webster's New International Dictionary* 2013 (2d ed. 1950) (same); 12 *The Oxford English Dictionary* 845 (1989) (defining "punishable" as "[l]iable to punishment; capable of being punished"). This Court has recognized that same meaning as well. See *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 113 (1983); *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 488 (1985) (acts "punishable" under federal law "consist[] not of acts for which the defendant has been convicted, but of acts for which he could be").

the Section 924(c) violation.[9] If Congress had wanted to require a federal conviction, it would have said so.[10]

Indeed, when Congress wanted to focus specifically on federal law violations in Section 924, it did not speak of a crime "punishable under" federal law, but instead directly required "an offense under the Controlled Substances Act." 18 U.S.C. 924(e)(2)(A)(i). Only when it employed such restrictive language did Congress then find it necessary to identify separately the categories of "offense[s] under State law" that would qualify as well. 18 U.S.C. 924(e)(2)(A)(ii). Congress's contrasting selection of more inclusive language in Section 924(c)(2) thus underscores that the definition of "drug trafficking crime" is not limited to federal "offense[s] under the Controlled Substances Act," but encompasses any offense, state or federal, that could be punished—is "punishable"—under federal law, whether as a felony of a misdemeanor. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).[11]

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[9] See, *e.g.*, *United States* v. *Anderson*, 39 F.3d 331, 355 (D.C. Cir. 1994) (collecting cases), vacated in part on reh'g en banc, 59 F.3d 1323 (D.C. Cir.), cert. denied, 516 U.S. 999 (1995); *United States* v. *Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.) ("[I]t is only the fact of the offense, and not a conviction, that is needed to establish the required predicate."), cert. denied, 498 U.S. 824 (1990).

[10] See, *e.g.*, 18 U.S.C. 2251(e) (Supp. III 2003) (requiring a "conviction under" designated federal laws); 8 U.S.C. 1357(d) (requiring a "violation of any law relating to controlled substances"); 12 U.S.C. 3420(b)(1)(A) (requiring a "violation of the Controlled Substance[s] Act [21 U.S.C.A. § 801 et seq.], [or] the Controlled Substances Import and Export Act [21 U.S.C.A. § 951 et seq.]"); 18 U.S.C. 1956(c)(7)(D) (Supp. III 2003) (requiring, *inter alia*, a "felony violation of * * * section 422 of the Controlled Substances Act"); 23 U.S.C. 159(a)(3)(A)(i)(I) ("any violation of the Controlled Substances Act").

[11] The Court has repeatedly invoked that principle of statutory construction

Second, Congress referred in Section 924(c)(2) to "any felony," and "any" is an all-encompassing word that reaches all members of a class regardless of individual variations. This Court has already held, with respect to Section 924(c) specifically, that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Had Congress wanted to require a federal felony, it knew how to say so. See 18 U.S.C. 521(c)(1) and (2) (defining covered offense as "a *Federal felony* involving a controlled substance" or "a *Federal felony* crime of violence") (emphases added). But here, unlike in Section 521, "[n]o modifier is present, and nothing suggests any restriction on the scope of" felonies described. *Lewis* v. *United States*, 445 U.S. 55, 60 (1980).

2. That plain text notwithstanding, petitioners devote substantial portions of their briefs to arguing (Lopez Br. 20-24; Toledo-Flores Br. 13-26) that the phrase "felony punishable under the Controlled Substances Act" means "federal crimes" (Lopez Br. 21; Toledo-Flores Br. 19) and "is limited to a federal drug crime" (Lopez Br. 22) and to "federal offenses" (Toledo-Flores Br. 25); see *id.* at 24.

Petitioners, however, could not mean what they say. That is because, for all their emphasis on Section 924(c)'s supposed federal aspect, petitioners have always agreed in this Court that some state-law controlled substance convictions qualify as convictions for "drug trafficking crime[s]," within the meaning of Section 924(c)(2), and therefore as aggravated felonies under 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004). See Lopez Br. 24-25, 28; Toledo-Flores Br. 6-7, 11-12. The questions presented and supporting arguments in their petitions for certio-

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to interpret Section 924. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (interpreting Section 924(c)); *Custis* v. *United States*, 511 U.S. 485, 492 (1994) (18 U.S.C. 924(e)).

rari focus not on *whether* state-law offenses are drug-trafficking crimes, but on *which* state offenses qualify. 05-547 Pet. i, 7-18; 05-7664 Pet. i, 10-17. And the foundational premise of the hypothetical-federal-felony approach that petitioners endorse in their merits briefs is that a state-law controlled substance offense can be a "drug trafficking crime," and thus an "aggravated felony," as long as it would hypothetically be punished as a felony under federal law. See Lopez Br. 28; Toledo-Flores Br. 11-12.

In any event, petitioners' arguments are incorrect. Lopez argues (Br. 24-25) that a state-law offense qualifies as a "drug trafficking crime" only if the "government proves that the defendant in fact violated th[e] [Controlled Substances] Act," and suggests that the proof must be "beyond a reasonable doubt" (*ibid.* (citing *United States* v. *Hopkins*, 310 F.3d 145, 152 (4th Cir. 2002), cert. denied, 537 U.S. 1238 (2003)). But in civil immigration and federal sentencing proceedings, the government need only prove the fact of a conviction, and the INA provides that the conviction can be proved simply by producing proper documentation of the conviction. 8 U.S.C. 1229a(c)(3)(B). Neither a sentencing court nor immigration officials sit as a second criminal tribunal to retry the original offense or to reprove particular elements.[12] In addition, Lopez's argument overlooks that the operative provisions of both the INA and the Sentencing Guidelines require a "convic-

[12] In sentencing cases, proof is by a preponderance of the evidence. See *United States* v. *Watts*, 519 U.S. 148, 157 (1997); U.S.S.G. § 6A1.3, comment.; *cf. Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). In immigration cases, the burden of proof as to the fact of a "conviction" shifts depending on the context in which the question arises. The government must prove an alien is removable for conviction of an aggravated felony by clear and convincing evidence, 8 U.S.C. 1229a(c)(3)(A), but if the alien is seeking relief from removal, he must prove by a preponderance of the evidence the absence of such a conviction, 8 C.F.R. 1240.8(d). See generally 8 U.S.C. 1229a(c)(3)(B) (identifying what evidence constitutes "proof of a criminal conviction").

tion" of an "aggravated felony,"and thus an actual "conviction" of an actual, not hypothetical, "drug trafficking crime."[13] Whatever happens at an immigration or sentencing hearing, the fact remains that the only drug trafficking crimes of which petitioners were "convicted" were their state-law offenses, so only those state-law offenses can be the relevant "drug trafficking crime[s]."[14]

Alternatively, petitioners contend (Lopez Br. 21-22; Toledo-Flores Br. 19-22) that the language in Section 924(c)(1)(A) that creates a federal crime for using a firearm during and in relation to a drug trafficking crime or a crime of violence shows that a "drug trafficking crime" must be a federal offense. They emphasize the language requiring that the drug trafficking crime or crime of violence be one for which the person "may be prosecuted in a court of the United States." 18 U.S.C. 924(c)(1)(A). That language, however, does not advance petitioners' cause. The INA incorporates Section 924(c)'s "defin[ition]" of "drug trafficking crime," 8 U.S.C. 1101(a)(43)(B), and only Section 924(c)(2) *defines* "drug trafficking crime." Subsection (c)(1) creates a substantive federal

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[13] See U.S.S.G. § 2L1.2(b)(1)(C); 8 U.S.C. 1101(f)(8), 1158(b)(2)(B)(i), 1182(a)(9)(A)(i) and (ii), 1227(a)(2)(A)(iii), 1229b(a)(3) and (b)(1)(C), 1229c(b)(1)(B), 1231(b)(3)(B).

[14] The INA's definition of "conviction," 8 U.S.C. 1101(a)(48)(A), which triggers the immigration and sentencing consequences of an aggravated felony, itself makes the law of the convicting jurisdiction determinative. Section 1101(a)(48)(A) provides in full:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

offense; it is not a definitional provision. Indeed, if Section 924(c)(2) had the federal-felony limitation that petitioners posit, there would have been no reason for Congress separately to require that the drug trafficking crime be subject to prosecution in federal court before it will support a 924(c)(1) federal prosecution.[15]

Finally, because petitioners agree that the definition of "drug trafficking crime" incorporated into the aggravated felony definition includes some state-law controlled substance offenses, their reliance (Toledo-Flores Br. 13-15; Lopez Br. 37) on the presumption against application of state law in federal statutes, *Jerome* v. *United States*, 318 U.S. 101, 104 (1943), is misplaced. Congress's express command in the INA that "State law" applies to the definition of "drug trafficking crime" as it is incorporated into the INA's aggravated felony provision, see 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence), conclusively dispels any such presumption. See *Jerome*, 318 U.S. at 104-106 (presumption can be overcome by the express reference to state law, legislative history, or

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[15] Moreover, while drug trafficking crimes are, by definition, already subject to prosecution in a court of the United States (because they must be punishable under federal law), the "may be prosecuted" language was necessary to confine the predicate "crime[s] of violence" for a Section 924(c)(1) prosecution to offenses that are punishable under federal law. See *Gonzales*, 520 U.S. at 5. That is because the statutory definition of "crime of violence"—unlike the neighboring definition of a "drug trafficking crime"—does not otherwise require that the qualifying conduct correspond to any federal criminal prohibition. See 18 U.S.C. 924(c)(3). Indeed, Congress enacted the "may be prosecuted" constraint in 1968, 18 years before it even added "drug trafficking crime" as a predicate offense under Section 924(c)(1), Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1224, and repeated it in 1984 when it first specifically included "crime[s] of violence" in that provision, which was two years before the inclusion of "drug trafficking crime," Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, § 1005(a), 98 Stat. 2138.

evidence that federal law would not be impaired if state law was included).[16]

D. A State-Law Felony Offense Is A Drug-Trafficking Crime Even If It is Not Hypothetically A Federal Felony

The question thus is not *whether* state-law offenses fall within the definition of "drug trafficking crime," but *which* ones. The text of Section 924(c)(2) answers that question. A state-law offense that (1) is a "felony," and (2) is "punishable under the Controlled Substances Act" or one of the other enumerated statutes, is a "drug trafficking crime." Nothing in that text, or the text that incorporates it into 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), imposes as a third condition that the offense also be a hypothetical federal felony.

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[16] Likewise, because petitioners agree that the phrase "any felony punishable under the Controlled Substances Act" in Section 924(c)(2) includes some state-law convictions, their argument that Section 924(g)'s use of the same "punishable under" phraseology excludes state-law controlled substance offenses is unavailing. Lopez Br. 22; Toledo-Flores Br. 23-24. Section 924(g) reaches conduct "punishable" under the Controlled Substances Act and conduct that violates "any State law relating to any controlled substance." 18 U.S.C. 924(g)(2)-(3). By its plain terms, the latter subsection sweeps in state offenses that have no clear parallel prohibition (whether misdemeanor or felony) in the Controlled Substances Act, such as state laws proscribing the solicitation of controlled substances, loitering in circumstances that manifest an intent to commit a controlled substance offense, the intrastate transportation of drugs (including with a minor), causing death with a controlled substance, or the felony possession of drugs in specialized areas, such as schools, recreation centers, housing projects, abuse shelters, day care centers, or churches. See, *e.g.*, Ala. Code § 13A-12-202 (2005); Alaska Stat. § 11.71.040(a)(4) (LexisNexis Supp. 2005); Ark. Code Ann. § 5-64-411 (LexisNexis 2005); Cal. Penal Code § 653f(d) (West 1999); Cal. Health & Safety Code 11379, 11532 (West Supp. 2006); Conn. Gen. Stat. § 21a-279(d) (2003); Mo. Rev. Stat. § 195.025, 195.213 (2000); Nev. Rev. Stat. § 453.333 (2005).

1. The Phrase "Punishable Under the Controlled Substances Act" Substantively Describes the Qualifying Criminal Conduct

Consistent with the "aggravated felony" provision's focus on substantive categories of criminal conduct, Congress employed a definition of "drug trafficking crime" that comprises a number of criminal offenses by referring to all crimes that are punishable under the Controlled Substances Act and the other designated laws. For purposes of state-law convictions, the definition thus requires that state law proscribe a criminal act that is also prohibited by one of the federal laws. State-law controlled substance offenses that involve conduct that is not punishable under the Controlled Substances Act, see note 16, *supra*, do not qualify as "drug trafficking crime[s]" and on that ground alone are not aggravated felonies. In this case, there is no dispute that petitioners' cocaine possession offenses are punishable under the Controlled Substances Act. See 21 U.S.C. 844(a); 18 U.S.C. 2(a) ("Whoever * * * aids, abets, counsels, commands, induces or procures" the commission of an offense against the United States "is punishable as a principal").[17]

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[17] See also *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1949) (it is "well engrained in the law" that one who aids or abets an offense "is as responsible for that act as if he committed it directly"). The Government recently filed a petition for a writ of certiorari seeking review of a Ninth Circuit decision limiting the application of the INA's aggravated felony definition as to aiding and abetting offenses. See *Gonzales* v. *Duenas-Alvarez*, No. 05-1629 (filed June 22, 2006). Lopez has never disputed that the aggravated felony definition encompasses aiding and abetting offenses or that aiding and abetting the possession of cocaine is conduct punishable under the Controlled Substances Act, and he did not seek this Court's review of those questions.

2. *"Felony" Means a Crime Punishable by the Convicting Jurisdiction by More than One Year in Prison*

a. *"Felony" Refers to the Length of the Authorized Sentence*

We agree with Lopez (Br. 25-27) that the term "felony" in Section 924(c)(2) takes its meaning from within the framework of Title 18, rather than from Title 21. To begin with, Section 924 is a provision of Title 18. Accordingly, its terms should be construed consistent with usage in that Title, unless Congress has directed otherwise, and Congress has not directed otherwise here. While Section 924(c)(2) defines the covered criminal conduct with express reference to the Controlled Substances Act in Title 21, Congress included no similar reference for the separate requirement that the crime be a "felony."

Title 18 contains no specific definition of "felony," but when a word is not defined by statute, courts "normally construe it in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993). Longstanding usage of the term "felony" in Title 18 and throughout the United States Code focuses not on the label put on the crime, but on the "severity of the punishment" imposed by the convicting jurisdiction. *Jerome*, 318 U.S. at 108 n.6. Throughout Title 18, unless otherwise indicated, the term "felony" has been understood to refer to a crime punishable by death or imprisonment for more than one year. *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 272 n.2 (1942).[18] Indeed,

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[18] See *Robles-Rodriguez*, 281 F.3d at 904 ("Congress has a longstanding practice of equating the term 'felony' with offenses punishable by more than one year's imprisonment."); *United States* v. *Urias-Escobar*, 281 F.3d 165, 167-168 (5th Cir.) ("[F]ederal law traditionally defines a felony as a crime punishable by over one year's imprisonment."), cert. denied, 536 U.S. 913 (2002); *United States* v. *Graham*, 169 F.3d 787, 792 (3d Cir.) ("The one-year mark was used by Congress as early as 1865."), cert. denied, 528 U.S. 845

until 1984, Congress specifically defined "felony" in Title 18 as "[a]ny offense punishable by death or imprisonment for a term exceeding one year." 18 U.S.C. 1(1) (1982), repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, Ch. II, § 218(a)(1), 98 Stat. 2027. In 1984, Congress replaced that provision with Section 3559, which, while lacking a specific definition, continued to classify all federal criminal offenses based on the length of the "maximum term of imprisonment authorized" and to make any offense for which the authorized penalty is more than one year of imprisonment a felony. 18 U.S.C. 3559(a); see U.S.S.G. § 2L1.2, comment. (n.2) (defining "felony" as "any federal, state, or local offense punishable by a term of imprisonment for a term exceeding one year").

That definition is repeated, either in terms or in substance, throughout the United States Code, including within 18 U.S.C. 924 and the Controlled Substances Act. Importantly, a number of those provisions refer to both state and federal convictions, which shows that the term "felony" does not, standing alone, necessarily connote a federal felony. See, *e.g.*, 18 U.S.C. 924(e)(2)(B); 21 U.S.C. 802(44).[19] The vast majority of States apply that same definition as well.[20] Cf. *Taylor* v. *United*

(1999); *United States* v. *Burston*, 159 F.3d 1328, 1335 n.13 (11th Cir. 1998) (the "traditional definition of a felony" is an offense "punishable by death or imprisonment in excess of one year"); *United States* v. *Page*, 84 F.3d 38, 41 (1st Cir. 1996) ("[F]elony had long been defined as 'any offense punishable by * * * imprisonment for a term exceeding one year.'") (citation omitted).

[19] See also 7 U.S.C. 2024(b)(1) and (c); 18 U.S.C. 751(a), 922(g)(1), 3156(a)(3), 3592(c)(2) and (10); 22 U.S.C. 2714(e)(3); 28 U.S.C. 540A(c)(1); 29 U.S.C. 186(d)(1) and (2); 49 U.S.C. 31301(9); 49 U.S.C. 44936(b)(1)(B)(xiv)(IX) (Supp. III 2003); Fed. R. Evid. 609(a) advisory committee's note.

[20] See Ala. Code § 13A-1-2(8) (2005); Alaska Stat. § 11.81.900(a)(24) (LexisNexis Supp. 2005); Ark. Code Ann. § 5-4-401 (LexisNexis 2006); Cal. Penal Code §§ 17, 19.2 (West 1999); Conn. Gen. Stat. § 53a-25 (2003); Del. Code Ann. title 11, §§ 233, 4205-4206 (2001 & Supp. 2004); Fla. Stat. § 775.08 (2001); Ga. Code Ann. § 16-1-3(5) (2003); Haw. Rev. Stat. § 701-107(2) (1993); Ind. Code

States, 495 U.S. 575, 598 (1990) (construing the term "burglary" in 18 U.S.C. 924(e)(2)(B)(ii) in accord with "the generic sense in which the term is now used in the criminal codes of most States").

Accordingly, in the absence of any contrary indication, the Court should give the term "felony" its "well-established meaning" in federal law. *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 86 (2000). Furthermore, focusing the definition of "felony" on the maximum punishment authorized for an offense under the law of the convicting jurisdiction provides a level of uniformity to the definition of drug trafficking crime by making the applicability of a state-law conviction turn not upon varying nomenclature, see *Small* v. *United States*, 544 U.S. 385, 393 (2005), but upon an objective measure of the seriousness with which the convicting jurisdiction regards the offense.[21]

Ann. § 35-50-2-1 (LexisNexis 2004); Kan. Stat. Ann. §§ 21-3105, 21-4501 to 21-4502 (1995 & Supp. 2004); Mich. Comp. Laws Ann. § 761.1(g) (West 2000); Minn. Stat. Ann. § 609.02(2) (West Supp. 2006); Mo. Rev. Stat. § 556.016(2) (2000); Neb. Rev. Stat. §§ 28-105, 28-106 (Supp. 2004); N.H. Rev. Stat. Ann. § 625:9(III) (Supp. 2005); N.Y. Penal Law § 10.00(5) (2004); N.D. Cent. Code § 12.1-32-01 (1997); Ohio Rev. Code Ann. § 2901.02 (LexisNexis 2006); Okla. Stat. title 21, §§ 5-6, 10 (2001); Or. Rev. Stat. § 161.525 (2005); R.I. Gen. Laws § 11-1-2 (2002); S.D. Codified Laws § 22-1-4 (West Supp. 2006); *id.* § 22-6-2 (2004); Tex. Penal Code Ann. § 1.07(23) (West Supp. 2006); *id.* §§ 12.21-12.23 (2003); Utah Code Ann. §§ 76-3-102, 76-3-204 (2003); Va. Code Ann. §§ 18-2-8, 18-2-10 (LexisNexis 2004); Wash. Rev. Code Ann. § 9A.04.040(2) (West 2000); Wyo. Stat. Ann. § 6-10-101 (LexisNexis 2005). Four States define "felony" in terms of whether the offense is punishable by incarceration in a state prison or "at hard labor," which in practice appears to correspond with the traditional definition of a felony. See Idaho Code Ann. §§ 18-111 to 18-113 (2004 & Supp. 2005); La. Rev. Stat. Ann. § 14:2(4) (West Supp. 2006); Miss. Code. Ann. § 1-3-11 (West 1999); W. Va. Code Ann. § 61-11-1 (LexisNexis 2005).

[21] Section 802(13) of Title 21 defines "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony." Some courts have applied that definition of "felony" in holding (at the government's behest)

b. "Felony" Status Depends on the Sentence Authorized by the Convicting Jurisdiction

Petitioners do not dispute (i) that the conduct of which they were convicted was "punishable under the Controlled Substances Act," or (ii) that whether an offense is a "felony" for these purposes turns upon the length of the authorized term of imprisonment. The problem for petitioners is that their state-law convictions—which were subject to terms of imprisonment exceeding one year and were for conduct punishable under the Controlled Substances Act—fall squarely within the plain meaning of Section 924(c)(2), as incorporated into 8 U.S.C. 1101(a)(43)(B). That reading, moreover, gives full effect to every word of the relevant statutory provisions, and leaves nothing else to interpret.

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that a State's designation of an offense as a "felony" is sufficient for purposes of Section 924(c). The Court need not resolve that issue in this case, however, because petitioners' offenses were both designated felonies under state law *and* punishable by more than one year in prison. See S.D. Codified Laws § 22-42-5 (Michie 1988); *id.* § 22-6-1(7) (1988 & Supp. 1997); Tex. Health & Safety Code Ann. § 481.102 (West Supp. 2006); *id.* § 481.115 (2003); Tex. Penal Code § 12.35 (West 2003). In any event, as petitioners note (Lopez Br. 26; Toledo-Flores Br. 26), Congress did not incorporate Title 21's definition of felony into 18 U.S.C. 924(c) (2000 & Supp. III 2003). Even if it had, that would not resolve the question of whether, for purposes of 21 U.S.C. 802(13), state or federal law is the "applicable" law in 18 U.S.C. 924(c)(2). Given that two States eschew the felony/misdemeanor distinction entirely, see N.J. Stat. Ann. § 2C:1-4 (2005); Me. Rev. Stat. Ann. title 17-A, § 1252 (2006), mere labels would not always suffice to categorize an offense as a drug trafficking crime. Moreover, reliance on the felony/misdemeanor label would be particularly unwieldy under the aggravated felony provision because that provision attaches consequences not only to state drug trafficking crimes, but also to foreign crimes. 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence). Cases relying upon foreign convictions as aggravated felonies have relied upon the length of the sentence to determine the crime's "felony" status. See, *e.g.*, *Ortiz* v. *INS*, 179 F.3d 1148, 1154-1156 (9th Cir. 1999); *United States* v. *Adkins*, 102 F.3d 111 (4th Cir. 1996), cert. denied, 522 U.S. 824 (1997).

In an effort to escape that conclusion, petitioners proffer a whole new definition of "felony" that has no basis in the law or precedent and is unworkable in practice. Petitioners argue (Lopez Br. 28; Toledo-Flores Br. 6-7, 12) that the "felony" requirement in Section 924(c) turns not on whether the offense is a "felony" in the convicting jurisdiction, but rather on whether it would be a felony if prosecuted in a different jurisdiction (*i.e.*, under federal law).[22] In other words, in petitioners' view, the felony status of the crime under state law is not enough. Federal law must second the State's judgment. There are four significant problems with that approach.

First, that is not how Congress wrote Section 924(c)(2). There is only one "felony" in the definition, and its only descriptor is the word "any," which is a term of expansion, not qualification. 18 U.S.C. 924(c)(2) ("any felony"). "Had Congress intended the narrow construction petitioner[s] urge[], it could have so indicated," *Smith*, 508 U.S. at 229, by simply defining "drug trafficking crime" as "any felony punishable *as such* under the Controlled Substances Act," or "any offense that is punishable *as a felony* under the Controlled Substances Act." See, *e.g.*, *United States* v. *Wilson*, 316 F.3d 506, 513 (4th Cir.), cert. denied, 538 U.S. 1025 (2003); *Gerbier*, 280 F.3d at 307; *United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 364 (1st Cir. 1996). Congress, after all, knows how to write such words of limitation when it wants them. See 7 U.S.C. 12a(3)(H) (SEC may decline to register an individual who has been convicted of conduct "which would constitute a felony under Federal law if the offense had been committed under Federal jurisdiction"); 18 U.S.C. 521(c)(1) and (2) (requiring "a Federal felony involving a controlled substance" or "a Federal felony crime of

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[22] It is unclear whether petitioners, like amicus American Bar Association (Br. 8-13), would also require that the felony be punishable under state law by more than one year in prison, be classified as a "felony" by the State, or both. See *United States* v. *Amaya-Portillo*, 423 F.3d 427, 430-436 (4th Cir. 2005).

violence"). But Congress did not use such language here, and the Court should "decline to introduce that additional requirement on [its] own." *Smith*, 508 U.S. at 229 (declining to read into 18 U.S.C. 924(c)(1)'s prohibition against the "use" of a firearm the additional requirement that the firearm be used "as a weapon").

Second, petitioners' definition would require an unprecedented use of the term "felony," by requiring that an offense's qualifying status be determined by reference not to the jurisdiction of conviction, but to how another jurisdiction treats that offense. While federal law may establish the criterion for according a crime felony status—generally based on the term of imprisonment—satisfaction of that criterion is, in the absence of a contrary indication, assessed from the perspective of the convicting jurisdiction, not some other jurisdiction.[23] For example, 18 U.S.C. 16, which is also incorporated into the aggravated felony definition, 8 U.S.C. 1101(a)(43)(F), defines a "crime of violence" as, *inter alia*, a "felony" that entails a substantial risk of the use of force against a person or property. 18 U.S.C. 16(b). Courts have not limited state-law "crime[s] of violence" under that provision to those that would hypothetically be felonies under federal law.[24] Indeed, peti-

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[23] See, *e.g.*, 5 U.S.C. 7313(a); 5 U.S.C. 7371(a)(1); 5 U.S.C. 8148(b)(1); 7 U.S.C. 499d(d); 8 U.S.C. 1366(1) and (2); 21 U.S.C. 802(44); 21 U.S.C. 862a(a); 28 U.S.C. 540A(a); 29 U.S.C. 1111(a); 38 U.S.C. 5313(a)(1) and (b)(3); 38 U.S.C. 5313B(b)(1)(A) (Supp. III 2003); 42 U.S.C. 402(d)(7)(A); 42 U.S.C. 423(d)(6)(A) and (B); 42 U.S.C. 608(a)(9)(A)(i); 42 U.S.C. 1004(a)(2); 42 U.S.C. 1382(e)(1)(J)(4)(A); 42 U.S.C. 1437f(d)(1)(B)(v)(I); 42 U.S.C. 1437z(2)(A)(i).

[24] See, *e.g.*, *Leocal*, 543 U.S. at 7; *Francis* v. *Reno*, 269 F.3d 162, 169 (3d Cir. 2001) (felony status of crime in convicting jurisdiction, not its hypothetical felony status under federal law, is determinative); see also *United States* v. *Hernandez-Rodriguez*, 388 F.3d 779, 781 (10th Cir. 2004); *United States* v. *Campos-Fuerte*, 357 F.3d 956, 959 (9th Cir.), as amended, 366 F.3d 691 (9th Cir.), cert. denied, 543 U.S. 859 (2004); *Jobson* v. *Ashcroft*, 326 F.3d 367, 372 (2d Cir. 2003); cf. *United States* v. *Jackson*, 301 F.3d 59, 61 (2d Cir. 2002) (escape

tioners cite no decision from this Court, or from any court outside of the present context, that has ever held that whether an offense is a "felony" turns upon an analogous or hypothetical crime's status in a non-convicting jurisdiction.

Third, the question here is not the meaning of Section 924(c)(2) standing alone or in the abstract, but rather as incorporated *mutatis mutandis*—that is, with all necessary changes having been made—into 8 U.S.C. 1101(a)(43). See *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 16-17 (2000); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 680 (1986). Because Section 1101(a)(43) expressly covers state offenses, it follows from the very nature of the incorporation that the inclusion of a state drug offense as an aggravated felony should turn on whether the state of conviction treats the offense as a felony, as gauged by the term of imprisonment authorized.[25]

Third, as the Board of Immigration Appeals recognized after attempting to administer the test, the hypothetical-

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is a "felony" crime of violence for purposes of Section 924(e)), cert. denied, 539 U.S. 952 (2003); *United States* v. *Woods*, 233 F.3d 482, 485 (7th Cir. 2000) (burglary of a commercial building is a violent "felony" under Section 924(e)).

[25] To the extent that the Title 21 definition of "felony" is thought relevant here, it also supports looking to the law of the convicting jurisdiction to determine whether a crime is classified as a "felony" under 18 U.S.C. 924(c)(2), as incorporated into 8 U.S.C. 1101(a)(43)(B). Under 21 U.S.C. 802(13), "[t]he term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony." Accord 21 U.S.C. 802(44) ("'felony drug offense' means an offense that is punishable by imprisonment for more than one year under any law of the United States *or* of a State *or* foreign country") (emphases added). Each of petitioners' offenses is a "felony" under the Controlled Substances Act's definitions, because each of their offenses was classified by applicable state law, both in name and by term of imprisonment, as a felony. See *Wilson*, 316 F.3d at 513 ("[W]hile the [Controlled Substances Act] would not *punish* Wilson's conduct as a felony, it does *define* it as a felony given the punishment it receives under Virginia law.").

federal-felony approach is unworkable. In *In re L-G-*, 21 I. & N. Dec. 89 (1995), withdrawn in part, *In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002), the Board initially held that an alien's state-law felony possession of more than 400 grams of cocaine, which resulted in a 20-year sentence at hard labor, was not a drug trafficking crime because it was not "analogous to a *felony* under the federal statutes." *Id.* at 90, 92. After years of attempting to administer that approach, the Board abandoned it. *Yanez-Garcia*, 23 I. & N. Dec. at 390-391. The Board held that, in the absence of contrary circuit precedent, it would follow the approach of the majority of the circuits and hold that a state-law felony offense, such as for felony possession, is a drug trafficking crime without regard to how the offense might have been punished under federal law. *Id.* at 393-398.

The Board explained that the majority approach "bears considerable logical force and flows coherently and intuitively from the relevant statutory language." *Yanez-Garcia*, 23 I. & N. Dec. at 397. The Board stressed, moreover, that the hypothetical-federal-felony approach that petitioners advocate had proven to be inadministrable in practice. The Board repeatedly noted the "analytical difficulties inherent in the hypothetical felony approach" and "often-convoluted hypothetical analysis that can be difficult to apply in practice," *id.* at 393, 397-398.

> [W]hen determining whether a state drug conviction is analogous to a federal felony conviction, we are confronted with the fact that any hypothetical federal prosecution would have been governed by procedural and sentencing requirements entirely different from those that were, in fact, employed by the convicting state.

Id. at 392; see *id.* at 392, 396.[26]

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[26] While the Board is not entitled to deference in its construction of Section

Yanez-Garcia highlighted, as an example, the "analytical difficulties" that attend the treatment of recidivist drug possessions. Second or successive drug possession offenses are felonies under federal law, 21 U.S.C. 844(a), but may or may not be, in differing degrees and differing circumstances, under state law. Courts and the Board have wrestled with whether to condition the hypothetical federal felony determination on the fortuity of whether the state prosecutor complied with the type of notice and procedural constraints that are required by federal law. For example, the alien in *Yanez-Garcia* argued that his recidivist state-law felony possession offenses were not federal felonies, because federal law required that the first felony conviction be "final," and because he did not receive an "enhancement information" from a federal prosecutor, see 21 U.S.C. 851(a)(1). *Yanez-Garcia*, 23 I. & N. Dec. at 391-392.[27]

Furthermore, as noted earlier, some States have structured their controlled substance laws in ways that do not translate well into the federal system. Many State laws, including the South Dakota law under which Lopez was convicted, do not distinguish between cocaine and cocaine base,[28]

924(c)(2), a criminal statute that it has not been charged with administering, the Board's construction of 8 U.S.C. 1101(a)(43), and particularly its judgment, borne of hands-on experience, about the inadministrability of imposing the hypothetical-federal-felony approach on the INA's aggravated felony provision, merit deference. See *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 322 (1988) (Scalia, J., concurring in part and dissenting in part) ("[O]ne of the most important reasons we defer to an agency's construction of a statute [is] its expert knowledge of the interpretations' practical consequences."); see generally *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

[27] See also *Vacchio* v. *Ashcroft*, 404 F.3d 663, 675 (2d Cir. 2005) (prior conviction established a hypothetical federal felony); *Steele* v. *Blackman*, 236 F.3d 130, 137-138 (3d Cir. 2001) (strictly limiting use of prior convictions); cf. *Price* v. *United States*, 537 U.S. 1152 (2003).

[28] See, *e.g.*, S.D. Codified Laws §§ 34-20B-1(13), 34-20B-16(2) (West 2004); Ark. Code § 5-64-101(18)(B) (LexisNexis 2005); Idaho Code §§ 37-2701(t)(4), 37-

while federal law makes simple possession of specified amounts of cocaine base a felony, 21 U.S.C. 844(a). In addition, a prosecution under federal law based on the possession of more than a personal-use amount of drugs would ordinarily be for possession with intent to distribute, which is a felony, see 21 U.S.C. 841(a). But a number of States take a different approach, providing a graduated scheme of "possession" offenses that assigns felony treatment, with a potentially severe sentence, when the amount possessed is commensurate with a trafficking crime, while not specifically requiring proof of an intent to distribute. See *State* v. *Williams*, 471 So.2d 255, 258-259 (La. Ct. App. 1985) (defendant convicted of possessing 10,000 pounds of marijuana), writ denied, 475 So.2d 1102 (1985); *L-G-*, 21 I. & N. Dec. at 90 (alien convicted of "possession" of in excess of 400 grams of cocaine and sentenced to "20 years at hard labor").[29] There is no sound reason to withhold

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2707(a) and (b)(4) (2002); Kan. Stat. Ann. §§ 65-4107(a) and (b), 65-4127e(a) and (b) (1992); Miss. Code §§ 41-29-105(s)(4), 41-29-115(A)(a)(4) (Supp. 2005).

[29] See also *State* v. *Basurto*, 501 P.2d 970, 972 (Az. Ct. App. 1972) (noting foreign conviction for possession of three tons of marijuana); U.S. Br. at 3, 5, 10, *Salazar-Regino* v. *Moore*, No. 05-830 (filed Apr. 5, 2006) (one petitioner convicted of possessing between 50 and 2000 pounds of marijuana, which was punishable by 2 to 20 years in prison; second petitioner convicted of possessing between 5 and 50 pounds of marijuana, which was punishable by 2 to 10 years in prison); U.S. Br. at 4, 7, *Galindo-Pena* v. *Gonzales*, No. 05-1276 (filed July 7, 2006) (petitioner convicted of possessing 50 to 2000 pounds of marijuana and sentenced to eight years in prison); *In re Castillo-Zapata (alias Maria de Jesus Ramo)*, No. A37 837 447, at 2 (Immig. Ct. June 4, 2003); U.S. Br. in Opp. at 6, *Hernandez-Macias*, No. 05-11277 (filed Aug. 2, 2006) (petitioner convicted of possessing 50 to 2000 pounds of marijuana); *Gerbier*, 280 F.3d at 300-301, 313-314 (under Delaware law, possession of between 5 and 50 grams of cocaine is punished as "trafficking in cocaine"); Del. Code Ann. title 16, § 4753A(a) and (e) (2003 & Supp. 2004) (defining sale and distribution solely in terms of possession in excess of a designated weight); Ohio Rev. Code Ann. § 2925.11(C) (LexisNexis 2006) (criminalizing as "possession" the possession of "bulk amounts" of drugs "that are normally possessed by a drug seller, pusher or

the aggravated-felony designation from such crimes on the ground that the "possession" label attached by state law would, if transferred mechanically into the federal system, be only a misdemeanor offense of "simple possession." Petitioners, for all their concern with uniformity in the treatment of aliens, offer no explanation for why Congress would have wanted the aggravated-felony designation to turn upon either an unrealistic conception of how federal law operates in practice or the happenstance of how States formulate their controlled substance offenses, rather than the punishment they attach.[30]

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dealer," *State* v. *Goodnight*, 370 N.E.2d 486 (Ohio Ct. App. 1977)); Alaska Stat. § 11.71.040(a)(3)(G) and (d) (LexisNexis 2004) (felony possession of 25 or more marijuana plants); La. Rev. Stat. Ann. § 40:966(F) (West Supp. 2006) (felony possession of more than 60 pounds of marijuana); Me. Rev. Stat. Ann. title 17-A, §§ 1107-A(1)(A)-(B), 1252 (2006) (possession of more than 14 grams of cocaine punishable as a felony); Miss. Code Ann. § 41-29-139(c)(2)(D)-(G) (Supp. 2005) (felony possession of more than 250 grams of marijuana); Tex. Health & Safety Code Ann. § 481.121(a)(5) (West 2003) (felony possession of between 50 and 2000 pounds of marijuana); Tex. Health & Safety Code Ann. § 481.121(b) (West 2003) (graduated offenses for possession include life imprisonment for more than 2000 pounds of marijuana); Wash. Rev. Code Ann. §§ 69.50.4013, 69.50.4014 (Supp. 2006) (felony possession of more than 40 grams of marijuana).

[30] Lopez argues (Br. 28-29) that his unusual construction of "felony" must be adopted to prevent tension between the aggravated-felony removal provision, 8 U.S.C. 1227(a)(2)(A)(iii), and the INA provision excluding the first-time possession of 30 grams or less of marijuana for personal use from the "controlled substances" convictions that provide a separate basis for removal. See 8 U.S.C. 1227(a)(2)(B)(i). Whatever the traction of such an argument in theory, it has little basis in reality (a fact of which Congress presumably was aware). Thirty grams is approximately one ounce of marijuana, and only one State punishes the possession of less than one ounce of marijuana for personal use as a felony. See Fla. Stat. § 893.13(6)(a) and (b) (2001) (punishing possession of over 20 grams of marijuana as a felony). Lopez cites no case that has ever both fallen within that 10 gram gap and led to removal on aggravated felony grounds. While a handful of States draw the felony line at one ounce (more precisely, 28.3 grams), see Nev. Rev. Stat. §§ 453.336(4), 453.3395(1)

E. The Incorporation Of "Drug Trafficking Crime" Into 8 U.S.C. 1101(a)(43)(B) Ensures That Certain Possession Offenses Can Be "Aggravated Felonies"

Although Congress could have limited the drug offenses included as aggravated felonies to "illicit trafficking in a controlled substance," 8 U.S.C. 1101(a)(43)(B), Congress deliberately went further. Congress added that the qualifying offenses "includ[e] a drug trafficking crime (as defined in section 924(c) of Title 18)." In so doing, Congress sought to ensure that the category of controlled substance offenses that can trigger an aggravated felony designation would include certain types of offenses less commonly associated with "trafficking," such as the enumerated statutes' prohibitions on drug possession, see 21 U.S.C. 844(a), 955, and other similar offenses, see also 21 U.S.C. 843(a)(5) and (6) (possession of certain types of equipment). "In definiti[onal] provisions of statutes * * *, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration." *American Surety Co.* v. *Marotta*, 287 U.S. 513, 517 (1933). That is how Congress used "include" in other parts of the aggravated felony definition. See 8 U.S.C. 1101(a)(43)(G) ("theft offense" defined as "including receipt of stolen property"); 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (final sen-

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(1995); N.D. Cent. Code § 19.03-1-23(6) (Supp. 2005); Or. Rev. Stat. § 475.864(2) and (3) (2005), the government is aware of no removal case falling within the exceedingly marginal gap between 28.3 and 30 grams either. In any event, the remote prospect of such a case ever arising provides no basis for concluding that the term "felony" is used here in the novel manner that petitioners propose. It suggests at most that, in some hypothesized case in the future, a court might have to resolve whether the later enacted and specific personal-use exception, Immigration Act of 1990, Pub. L. No. 101-649, § 602(a), 104 Stat. 5077, overrides the general language of the aggravated felony provision. See *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996) ("[T]he specific governs over the general.").

tence) (defining "provision of law" as "including any effective date"). That is also how the term is employed throughout the INA's other definitional provisions. See 8 U.S.C. 1101(a)(14), (17), (28), and (36).

Indeed, having just defined "aggravated felony" in the preceding clause in 8 U.S.C. 1101(a)(43)(B) to mean, *inter alia*, "illicit trafficking in a controlled substance," the only evident function of the "including" clause is to ensure that the type of offense conduct covered would include offenses that are less commonly characterized as illicit trafficking, like possession. To hold otherwise, as amicus NYSDA argues (Br. 6-28), and read the entire "drug trafficking crime" clause as encompassing nothing more than offenses that are already a "subset" (*id.* at 6) of "illicit trafficking" would leave that entire clause "with no job to do." *Doe* v. *Chao*, 540 U.S. 614, 623 (2004). Congress, however, is not in the habit of drafting entire definitional clauses that "accomplish[] nothing," *ibid.*, and it is a "cardinal principle of statutory construction" that the Court must "give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section," *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997) (internal quotation marks omitted).

Nor is there anything incongruous about Congress's inclusion of possession offenses in a provision addressed to drug trafficking. First, in the same statute passed in 1988, Congress enacted both the broad definition of "drug trafficking crime" in Title 18 and the "aggravated felony" provision in the INA, and it deliberately linked the two by providing that "any drug trafficking crime as defined in section 924(c)(2) of title 18" constitutes an aggravated felony. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 6212, 7342, 102 Stat. 4360, 4469. The title of that law, moreover, was not the Anti-Drug Trafficking Act, but the "Anti-Drug Abuse Act," an express purpose of which was "[t]o prevent the * * * use of illegal drugs." Preamble, 102 Stat. 4181.

Second, Congress has long recognized that illegal drug possession offenses "have a substantial and detrimental effect on the health and general welfare of the American people," and that individual acts of possession "have a substantial and direct effect" on illicit drug trafficking and "contribute to swelling the interstate traffic in such substances." 21 U.S.C. 801(2), (3) and (4); see *Gonzales* v. *Raich*, 125 S. Ct. 2195, 2209 (2005) (failure to regulate individual cultivation or use of controlled substances "would leave a gaping hole in the [Controlled Substances Act]"). Indeed, the cocaine that each petitioner possessed (or aided another in possessing) was itself the product of a chain of drug trafficking and sales.

"Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances." *Harmelin* v. *Michigan*, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring in part) (citation omitted). Indeed, because "drug abuse is one of the most serious problems confronting our society today," *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 674 (1989), there is no logical reason that Congress—having made offenses like failure to appear, obstruction of justice, and mutilating a passport "aggravated felonies," 8 U.S.C. 1101(a)(43) (P), (Q), (S) and (T)—would want to be particularly solicitous of aliens who fuel "the drug epidemic in this country," *Harmelin*, 501 U.S. at 1003 (Kennedy, J., concurring in part). See *Barrett*, 20 I. & N. Dec. at 175 (in 19 U.S.C. 924(c)(2), "Congress has sent out a clear message that narcotics offenses are to be dealt with harshly.") (citation omitted).

Third, petitioners' assumption that there is some clear divide between drug possession offenses and drug trafficking overlooks that, as explained above, States have adopted a variety of strategies within their criminal codes to combat drug abuse. Federal law and prosecutorial practice generally police

trafficking offenses by charging possession of more than a personal-use amount of a drug as possession with intent to distribute, which is a federal felony, see 21 U.S.C. 841(a) and (b)(1) (2000 & Supp. III 2003).[31]

A number of States, however, take a different tack and establish a graduated system of penalties for possession, under which possession of trafficking-level amounts of a controlled substance are subject to the same type of severe penalties as federal trafficking offenses, even though the offense of conviction remains denominated "possession." Indeed, the individual whom amicus Asian American Justice Center describes (Br. 15) as a "positive contributor[] to American society" and unjustly labeled as a "traffick[er]" was convicted in Texas of possessing between 50 and 200 pounds of marijuana. *In re Castillo-Zapata (alias Maria de Jesus Ramo)*, No. A37 837 447, at 2 (Immig. Ct. June 4, 2003); see note 29, *supra*; cf. *Raich*, 125 S. Ct. at 2214 nn. 41 & 42.

A state-law conviction for "possession" of a controlled substance thus does not have the singular, non-trafficking connotation that petitioners' arguments assume (Lopez Br. 18-20; Toledo-Flores Br. 15-18). Accordingly, Congress sensibly included within the category of drug-related "aggravated felonies" those possession offenses that are sufficiently serious to be punished by the State of conviction as a felony.

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[31] See, *e.g.*, *United States* v. *Haskins*, 166 Fed. Appx. 76 (4th Cir. 2006) (per curiam) (charging possession with intent to distribute 310.6 grams—approximately 11 ounces—of marijuana); *United States* v. *Rangel*, 149 Fed. Appx. 254, 255 (5th Cir. 2005) (per curiam) (charging possession with intent to distribute 771 grams—approximately 1.75 pounds—of marijuana); see generally 28 C.F.R. 76.2 (defining "personal use amounts" of various controlled substances).

F. The Legislative History Does Not Support Petitioners

Petitioners argue (Lopez Br. 29-33; Toledo-Flores Br. 29-37) that the legislative history supports their proposed hypothetical-federal-felony approach. As an initial matter, because the meaning of "felony" is plain, the meaning of "punishable under the Controlled Substances Act" is plain, and the inclusion of state-law offenses is plain, this Court need not "not resort to legislative history" in an effort "to cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994); see *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455, 2459 (2006).

Beyond that, what is notably missing from petitioners' legislative-history argument is *any* specific discussion of the issue presented here. Whatever the legitimacy of relying on legislative history that actually discusses the statutory construction question before the Court, inferences distilled from isolated statements addressed to other legislative concerns provide no basis for narrowing or disregarding straightforward statutory text.

In any event, even the materials that petitioners cite fail to support their position. First, petitioners argue (Lopez Br. 30-31; Toledo-Flores Br. 30-32) that Congress's enactment in 1988 of the current definition of "drug trafficking crime," see Anti-Drug Abuse Act, § 6212, 102 Stat. 4360, was a "clarification" of prior text that encompassed "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance," 18 U.S.C. 924(c)(2) (Supp. V 1987). But that contention begs the question of how much clarifying Congress did. Statutory "clarifications" sometimes effect "significant change" in the law. *United States* v. *California*, 381 U.S. 139, 155 (1965); see *id.* at 197 (Black, J., dissenting); see also *Commissioner* v. *Bilder*, 369 U.S. 499, 503-504 (1962).

Lopez argues (Br. 31) that the amended text made clear that possession with intent to distribute was covered. It certainly did. But the text does not stop there. As incorporated into 8 U.S.C. 1101(a)(43), the new definition also reaches—by petitioners' own admission (Lopez Br. 28; Toledo-Flores Br. 11-12)—some state-law offenses. In addition, the new language captures, under petitioners' own reading, some possession felonies, because the Controlled Substances Act and the Controlled Substances Import and Export Act punish certain possession offenses as felonies. See 21 U.S.C. 844(a), 955. As to which state-law offenses and which possession offenses are covered, the legislative record in 1988 says no more. The closest it comes is Senator Biden's statement that "[t]he amendment makes clear that section[] 924(c) * * * cover[s] *all* drug felonies." 134 Cong. Rec. 32,695 (1988). But that statement hurts, rather than helps, petitioners.

Second, petitioners attempt (Lopez Br. 31-33; Toledo-Flores Br. 32-37) to derive support for their position from the history of the 1990 amendment to the INA that directed that "aggravated felony" encompasses any offense "described in" Section 1101(a)(43), "whether in violation of Federal or State law" or foreign law. But there is nothing there to help petitioners. Both petitioners agree (Lopez Br. 32; Toledo-Flores Br. 34-35) that Congress intended to codify the Board's decision in *Barrett*, which had held that state-law offenses are "drug trafficking crime[s]" within the meaning of Section 924(c)(2). See 20 I. & N. Dec. at 175 ("[I]t is unreasonable to assume that Congress * * * sought to differentiate between aliens convicted of similar drug-related offenses on the basis of whether the conviction was accomplished under state or federal law."). The Board also held that the state crime must be "sufficiently analogous" to a federal felony. *Ibid.* But the Board did not then "speak to the question whether, for purposes of determining if a state drug conviction constituted a

'drug trafficking crime,' it mattered whether the state conviction was a misdemeanor or a felony." *Gerbier*, 280 F.3d at 304. And, as Toledo-Flores acknowledges (Br. 35), nothing in the legislative history speaks to or even refers to the aspect of the Board's holding that required a "sufficiently analogous" federal felony. Indeed, nothing suggests that Congress had in mind any limitation at all on the types of state-law offenses encompassed within the aggravated felony provision, other than the textual directive that they be "described in" Section 1101(a)(43).[32]

Third, various indicia in the legislative history confirm the plain language reading of both the INA and Section 924(c)(2). "Trafficking" in its narrow sense was not Congress's only concern; Congress took aim at use and possession. The 1988 law included reducing the "use" of illegal drugs among its avowed purposes. See Anti-Drug Abuse Act, Pub. L. No. 100-690, 102 Stat. 4181 (preamble). The need to eradicate the demand for illegal drugs, and not just the supply, was frequently discussed in the legislative history, along with the enormous strain that incarcerating aliens for controlled substance offenses was putting on the States' criminal justice systems.[33] Thus, to the

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[32] Lopez argues (Br. 33) that, if state "drug trafficking crimes" fall within Section 924(c)(2), then there was no need for Congress to also cover "illicit trafficking" offenses. That is incorrect. The inclusion of "illicit trafficking" sweeps in all trafficking offenses, without the requirement that they be either felonies or conduct punishable under the Controlled Substances Act or the other designated federal laws. The added language thus captures, for example, trafficking offenses under other federal criminal laws, *e.g.*, 18 U.S.C. 2118 (robberies and burglaries involving controlled substances); 21 U.S.C. 1901 *et seq.* (Foreign Narcotics Kingpin Designation Act), and state misdemeanor trafficking offenses and felonies not covered by the Controlled Substances Act, see, *e.g.*, Haw. Rev. Stat. § 712-1248 (1993) (misdemeanor distribution of marijuana); note 16, *supra*.

[33] See 134 Cong. Rec. at 32,633-32,634 (Sen. Dole) ("[W]e will focus attention back on the crime—in most cases the felony—of possession of illicit drugs.");

extent the legislative history is relevant, it counsels against petitioners' proposed categorical exception for state possession offenses—especially the possession of drugs in quantities that are strongly indicative of trafficking and are accordingly regarded by the prosecuting jurisdiction as deserving of treatment as felonies.

G. Including State Felonies Is Consistent With Both Principles Of Uniformity And The Rule Of Lenity

1. As explained, the relevant statutory provisions, by their terms, include state-law drug felonies as aggravated felonies, without requiring a hypothetical-federal-felony counterpart. The courts of appeals that have addressed the question in the criminal sentencing context have uniformly agreed that the plain language covers state felony drug offenses,[34] with the

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id. at 32,636 (Sen. Chiles) ("[W]e cannot win the drug war if we do not reduce the demand for drugs."); *id.* at 32,652 (Sen. Helms) (failure to punish "[p]ossession alone" had been "a giant loophole" in the law); H.R. Rep. No. 681, *supra*, Pt. I, at 146-147 (noting, immediately before discussing *Barrett*, the large percentage of drug-related offenses committed by illegal aliens, both misdemeanors and felonies); *Criminal Aliens: Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 95 (1989) (Judge David Carter) ("The 'drug war' has focused on the federal level and failed to recognize that most offenders are under state jurisdiction."); *Illegal Alien Felons: A Federal Responsibility: Hearing Before the Subcomm. on Federal Spending, Budget & Accounting of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 1, 4, 5, 19, 21-22, 33, 51-52, 58, 97-98, 133 (1987); *id.* at 10 ("[T]he number of aliens involved in criminal activities, particularly drugs is increasing every day" and "creating a burden on an already overcrowded jail.").

[34] See *Restrepo-Aguilar*, 74 F.3d at 364-366 ("The statutory definition plainly does not require that an offense, in order to be a drug trafficking crime, be subject to a particular magnitude of punishment if prosecuted under the [Controlled Substances Act]."); *United States* v. *Rodriguez*, 26 F.3d 4, 7 (1st Cir. 1994) (relying on natural meaning of text because "[w]e are not at liberty * * * to rewrite the statutory scheme"); *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-147 (2d Cir.) (relying on statutory text), cert. denied, 528 U.S. 880

sole exception of a decision last year by the Sixth Circuit.[35] The Fifth and Eighth Circuits, and initially the Second Circuit, have found the language equally straightforward when applying it in immigration cases.[36] The Second, Third, Seventh, and Ninth Circuits have held to the contrary in immigration cases only, but in so doing they have relied upon a judicially inferred policy in favor of uniformity.[37] Indeed, in sentencing cases

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(1999); *Wilson*, 316 F.3d at 513 (the court "need look no further than the text of section 924(c)(2) to refute Wilson's argument"; "[T]here is no suggestion from the text of the statute itself that only those offenses that federal law punishes as felonies are eligible."); *United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997) (relying on statutory text); *United States* v. *Briones-Mata*, 116 F.3d 308, 309-310 (8th Cir. 1997) (per curiam) (contrary reading of text is "without merit"); *United States* v. *Ibarra-Galindo*, 206 F.3d 1337, 1340 (9th Cir. 2000) (relying on "the plain meaning of the text"), cert. denied, 531 U.S. 1102 (2001); *United States* v. *Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir.) (reliance on plain text), cert. denied, 519 U.S. 885 (1996); *United States* v. *Simon*, 168 F.3d 1271, 1272 (11th Cir.) (relying on the "plain language of the [Controlled Substances Act]"), cert. denied, 528 U.S. 844 (1999).

[35] See *United States* v. *Palacios-Suarez*, 418 F.3d 692, 699-700 (6th Cir. 2005) (relying on legislative history to require a hypothetical federal felony).

[36] See *Jenkins* v. *INS*, 32 F.3d 11, 14 (2d Cir. 1994) ("plain language" is "unequivocal[]"); *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 510 (5th Cir.) ("[T]he statutory language is clear."), cert. denied, 534 U.S. 935 (2001); 05-547 Pet. App. 4a (relying on "plain language" of the statute to adopt the same position in the immigration context as previously endorsed in the sentencing context); see also *Gerbier*, 280 F.3d at 318 (Reavley, J., dissenting) ("The words themselves seem to me to point to any state felony that would be conduct punishable under federal law.").

[37] See *Aguirre* v. *INS*, 79 F.3d 315, 317 (2d Cir. 1996) (relying on the perceived "interests of nationwide uniformity" in immigration law and avoiding "disparate treatment" of aliens); *Gerbier*, 280 F.3d at 310-311 (3d Cir.) (relying on "the legislative history of § 924(c)(2) and the need for uniformity in the immigration context"); *Gonzales-Gomez* v. *Achim*, 441 F.3d 532, 535-536 (7th Cir. 2006) (expressing concerns about allowing state law "to determine matters that are at the heart of the federal immigration laws," and the perceived need to avoid "disuniformity" in immigration law); *Cazarez-Gutierrez* v. *Ashcroft*,

where that perceived policy does not apply, both the Second and Ninth Circuits continue to apply the plain reading of the exact same statutory language and hold that state-law drug felonies *are* aggravated felonies, whether or not the conduct would be punishable as a felony under federal law.[38] That pattern of judicial decisionmaking underscores that petitioners' hypothetical-federal-felony approach is not the product of statutory ambiguity, but of a policy argument in search of a textual home.

Moreover, the reliance of some courts, echoed by petitioners here (Lopez Br. 33-37; Toledo-Flores Br. 39-43), on a policy they perceive in favor of uniformity in immigration law is misplaced. First, such general notions cannot trump unambiguous text, like "any felony" in 18 U.S.C. 924(c)(2), and the INA's express inclusion of any offense "described in" the aggravated felony provision regardless of "whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence).

Second, the dispute here is not between uniformity and disuniformity. It is a dispute about different baselines for uniformity. The government's position, in accord with the statutory text, ensures uniformity in that only drug trafficking crimes that are both "felon[ies]"—offenses subject to a term of more than one year in prison—in the charging jurisdiction

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382 F.3d 905, 910-918 (9th Cir. 2004) (relying exclusively on interests in "national uniformity" and avoiding "inequitable consequences," and a finding that there was "nothing in the legislative history to rebut the presumption that Congress intended uniform application of the immigration laws").

[38] See *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-147 (2d Cir.), cert. denied, 528 U.S. 880 (1999); *Cazarez-Gutierrez*, 382 F.3d at 911; *Robles-Rodriguez*, 281 F.3d at 904-905; see also *Yanez-Garcia*, 23 I. & N. Dec. at 395 ("[T]he Second Circuit made clear in *Aguirre* [that] it adopted the Board's approach out of a desire for a uniform national rule, and not necessarily because it agreed with our interpretation of 18 U.S.C. 924(c)(2).").

and involve conduct that is "punishable under" the specified federal drug laws will trigger "aggravated felony" status.

Petitioners, by contrast, want to draw the line at requiring a conviction for conduct that would amount to a federal felony even if charged in a jurisdiction with materially different drug laws. However, petitioners' approach leads to substantial disuniformity and divergent outcomes for aliens who have engaged in the same conduct—such as the possession of 2000 pounds of marijuana—based on whether the defendant is charged in federal or state court, how States happen to structure their controlled substance laws, the extent to which state laws coincide with the design of federal law, and the amount of information recorded in a plea or conviction records, such as the amount and type of drugs involved. See, *e.g.*, 05-547 Gov't Pet. Stage Br. 4 n.3 (whether Lopez's conviction was for a federal felony turns upon information lacking from the record, such as the amount of cocaine and whether it was cocaine or cocaine base); see generally *Shepard* v. *United States*, 544 U.S. 13 (2005). A defendant arrested with such a significant quantity of drugs would normally be prosecuted in the federal system as a felon for possession with intent to distribute. See 21 U.S.C. 841(a). Many state statutes provide an analogous felony. But other States have chosen another option—denominating the crime possession, but punishing the possession of large amounts with significant prison time. As the text and structure of 8 U.S.C. 1101(a)(43)'s definition of "aggravated felony" attests, Congress was aware both that States are the primary enforcers of the criminal law within our federalist system, and that States formulate their criminal prohibitions in varied ways and in response to state-based interests and concerns. Against that backdrop, there is no sound reason that Congress would have wanted the felony classification of the same illicit drug activity to vary based on

the presence or absence of a directly and technically analogous federal felony.

Petitioners also argue (Lopez Br. 35; Toledo-Flores Br. 42-43) that failure to adopt the hypothetical-federal-felony approach would call into doubt the constitutionality of the statute. That argument is without merit. The Constitution empowers Congress "[t]o establish an uniform Rule of Naturalization," U.S. Const. Art. I, § 8, Cl. 4—*i.e.*, to enact a single set of standards to determine who may become a *citizen* of this Nation and of its several States. See *The Federalist* No. 42, at 269-271 (James Madison) (Clinton Rossiter ed. 1961). This case, however, involves the removal of aliens who commit crimes, not standards for citizenship.

Moreover, even if the Uniformity Clause applied to Congress's regulation of criminal aliens, it would not dictate that Congress address that problem without heed to state law, which, after all, is the primary source of criminal prohibitions. Quite the opposite, the Uniformity Clause "is not a straightjacket that forbids Congress to distinguish among classes," or to "recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States." *Railway Labor Executive's Ass'n* v. *Gibbons*, 455 U.S. 457, 469 (1982) (applying the bankruptcy portion of the Uniformity Clause) (citation omitted).[39]

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[39] See *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 873 (1995) (Thomas, J., dissenting) ("Even after Congress chose to exercise its power to prescribe a uniform route to naturalization, the durational element of the citizenship requirement in the Qualifications Clauses ensured that variances in state law would continue to matter."); *Toll* v. *Moreno*, 458 U.S. 1, 13 n.18 (1982) (state law can affect the employment of aliens "to the extent consistent with federal law") (citation omitted); see also *Holmes* v. *Jennison*, 39 U.S. (14 Pet.) 540, 594 (1840) (opinion of Barbour, J.) ("The power of establishing a system of naturalization, and bankrupt laws, is contained in the same clause, and expressed, identically, in the same terms.").

2. Contrary to petitioners' arguments (Lopez Br. 37-38; Toledo-Flores Br. 38-39), the rule of lenity is not applicable here. First, that rule requires a "grievous ambiguity" in statutory text such that, "after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted and punctuation altered). There is no such grievous ambiguity here. Petitioners do not dispute that the plain language of the relevant texts includes state felony convictions. Lopez Br. 28; Toledo-Flores Br. 11-12; 8 U.S.C. 1101(a)(43)(penultimate sentence). While petitioners, their amici, and some courts have identified policy reasons for favoring narrower coverage of state-law offenses, those arguments have no anchor in statutory text. The rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961).

Second, even if applicable, the rule of lenity would not point in any particular direction in this case. While petitioners' hypothetical-federal-felony approach would benefit them, it would harm other aliens who, for example, were convicted of an offense that is a misdemeanor under state law, but a felony under federal law, either in its own right or due to a recidivist provision.[40]

Perhaps a court could devise a position that would require every possible distinguishing factor to be resolved in favor of a criminal alien. But there is no textual basis for layering multiple conditions and qualifications on a statute that applies to "any felony," "whether in violation of Federal or State law."

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[40] See *Yanez-Garcia*, 23 I. & N. Dec. at 392 n.3 ("[T]he hypothetical approach * * * could, under certain circumstances, result in unduly harsh consequences for persons convicted of misdemeanors under state law."); *United States* v. *Simpson*, 319 F.3d 81, 85-86 (2d Cir. 2002); *Gerbier*, 280 F.3d at 311 n.12.

See *Smith*, 508 U.S. at 239 ("The mere possibility of articulating a narrower construction * * * does not by itself make the rule of lenity applicable."). The rule of lenity has never been held to require the type of heads-the-alien-wins; tails-the-government-loses approach to statutory construction that petitioners and their amici advocate. Rather, the principle comes into play, if at all, only "at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991) (citation omitted).

CONCLUSION

The petition for a writ of certiorari in No. 05-7664 should be dismissed as moot. The judgment of the court of appeals in No. 05-547 should be affirmed. Alternatively, the judgments of the court of appeals in both cases should be affirmed.

Respectfully submitted.

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AUGUST 2006

APPENDIX A

UNITED STATES DISTRICT COURT
For the Southern District of Texas
Holding Session in Laredo

Case Number: 5:04CR00546-001
USM NUMBER: 35331-179

UNITED STATES OF AMERICA, PETITIONER

v.

REYMUNDO TOLEDO-FLORES, RESPONDENT

Filed: Sept. 10, 2004
Entered: Sept. 17, 2004

JUDGMENT IN A CRIMINAL CASE

☐ See Additional Aliases.
THE DEFENDANT:

Raul Martinez
Defendant's Attorney

☒ pleaded guilty to count(s) one on May 3, 2004

☐ pleaded nolo contendere to count(s) which was accepted by the court. _____

☐ was found guilty on _____ count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
8 U.S.C. § 1325	Illegal entry (felony)	02/22/2004	One

☐ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 9, 2004
Date of Imposition of Judgment

/s/ GEORGE P. KAZEN
GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

[9/10/04]
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 24 months.

The defendant was advised of the right to appeal the sentence, including the right to appeal in forma pauperis, upon proper documentation

☐ See Additional Imprisonment Terms.

☐ The court makes the following recommendation to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on_____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 1 year.

☐ See Additional Supervised Release Terms.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as deter-

mined by the court. *(for offenses committed on or after September 13, 1994)*

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if appropriate.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payment sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer to schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

If deported, the defendant is not to re-enter the United States illegally. If the defendant is deported during the period of probation or the supervised release term, supervision by the probation office becomes inactive. If the defendant returns, the defendant shall report to the nearest U.S. Probation Office immediately. Supervision by the probation officer reactivates automatically upon the defendant's reporting.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payment on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00		

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)*

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

☐ If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

☐ See Additional Restitution Payees.

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment

options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment at not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapter 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 13, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ installments of $ _____ over a period of _____ , to commence _____ days after the date of this judgment; or

D ☐ Payment in equal _____ installments of $ _____ over a period of _____ , to commence _____ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to U.S. District Clerk, P.O. Box 597, Laredo, TX 78042-0597

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number
Defendant and Co-Defendant Names
(including defendant number)

Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

- ☐ See Additional Defendants and Co-Defendants Held Joint and Several.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:
- ☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties and (8) costs, including cost of prosecution and court costs.

APPENDIX B

SUBCHAPTER I—GENERAL PROVISIONS

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses); or

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[1] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[2] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offenses described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in section 1581, 1582, 1583, 1584, 1585, or 1588 of title 18 (relating to peonage, slavery, and involuntary servitude);

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[1] So in original. Probably should be preceded by "is".

[2] So in original. Probably should be preceded by "is".

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information); 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter.[3]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is

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[3] So in original. Probably should be followed by a semicolon.

described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

(3)

No. 05-7664

In The Supreme Court of the United States

REYMUNDO TOLEDO-FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Has the Fifth Circuit erred in holding – in opposition to the Second, Third, Sixth, and Ninth Circuits – that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c), and hence an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law?

LIST OF PARTIES

1. United States of America.
2. Reymundo Toledo-Flores.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS AND SENTENCING GUIDELINES INVOLVED	1
STATEMENT	3
SUMMARY OF ARGUMENT	5
ARGUMENT	10
A STATE CONVICTION FOR SIMPLE POSSESSION OF A CONTROLLED SUBSTANCE IS AN "AGGRAVATED FELONY" UNDER 8 U.S.C. § 1101(a)(43)(B) ONLY IF THE OFFENSE IS PUNISHABLE AS A FELONY UNDER FEDERAL LAW. BECAUSE MR. TOLEDO-FLORES'S PRIOR OFFENSE (SIMPLE POSSESSION OF 0.16 GRAMS OF COCAINE) IS PUNISHABLE ONLY AS A MISDEMEANOR UNDER FEDERAL LAW, THE LOWER COURTS ERRED IN TREATING THAT OFFENSE AS AN "AGGRAVATED FELONY."	10
A. Introduction	10
B. Under the Background Presumption of *Jerome v. United States*, 318 U.S. 101, 104 (1943), It Must Be Assumed, Absent a "Plain Indication to the Contrary," that Congress Intended to Adopt the Federal Felony Approach, Not the State Felony Approach	13
C. The Text and Structure of the Statutory Provisions at Issue Here Support the Federal Felony Approach	15

TABLE OF CONTENTS – Continued

Page

D. The Statutory and Legislative History of the Relevant Provisions Supports the Federal Felony Approach 29

1. History of 18 U.S.C. § 924(c) 30

2. History of 8 U.S.C. § 1101(a)(43) 32

3. Conclusion 37

E. Even If the Text, Structure, and History of the Statutory Provisions at Issue Here Did Not Clearly Support the Federal Felony Approach, That Approach Would Nonetheless Be Required by Application of the Rule of Lenity 38

F. The Federal Felony Approach Furthers the Well-Established Interest in Uniform Nationwide Application of Both Criminal Laws and Immigration Laws, and Also Avoids the Troubling Constitutional Questions that the State Felony Approach Raises 39

G. Summary 43

CONCLUSION 44

TABLE OF AUTHORITIES

Page

CASES

Aguirre v. INS, 79 F.3d 315 (2d Cir. 1996) 12

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 30

American Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991) 36

Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905 (9th Cir. 2004) ..... *passim*

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 26

Clark v. Martinez, 543 U.S. 371 (2005) 12

Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 (1993) 42

Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1983), *superseded by statute*, Firearms Owners' Protection Act, Pub. L. No. 99-308, § 101(5), 101 Stat. 449 (1986) 14

Field v. Mans, 516 U.S. 59 (1995) 24

Francis v. INS, 532 F.2d 268 (2d Cir. 1976) 42

Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2001) ..... *passim*

Gonzales-Gomez v. Achim, 441 F.3d 532 (7th Cir. 2006) 28

Gonzales-Gomez v. Achim, 372 F. Supp. 2d 1062 (N.D. Ill. 2005) *aff'd*, 441 F.3d 532 (7th Cir. 2006) ..... *passim*

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 23

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 39

TABLE OF AUTHORITIES – Continued

Page

INS v. Errico, 385 U.S. 214 (1966) 39

INS v. St. Cyr, 533 U.S. 289 (2001) 39

Jenkins v. INS, 32 F.3d 11 (2d Cir. 1994) 26

Jerome v. United States, 318 U.S. 101 (1943) .....*passim*

Johnson v. Pettiford, 442 F.3d 917 (5th Cir. 2006) 5

Kuhali v. Reno, 266 F.3d 93 (2d Cir. 2001) 15

Ladner v. United States, 358 U.S. 169 (1958) 38

Leocal v. Ashcroft, 543 U.S. 1 (2004) 12, 15

Lindh v. Murphy, 521 U.S. 320 (1997) 24

Lopez v. Gonzales, 417 F.3d 934 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1651 (2006) 12, 26

Lorillard v. Pons, 434 U.S. 575 (1978) 36

Matter of Davis, 20 I. & N. Dec. 536, 1992 WL 443920 (BIA 1992) 15, 16, 17, 35, 36

Matter of Barrett, 20 I. & N. Dec. 171, 1990 WL 385754 (BIA 1990) 34, 35

Matter of K–V–D–, 22 I. & N. Dec. 1163, 1999 WL 1186808 (BIA 1999) 41

Matter of L– G–, 21 I. & N. Dec. 89, 1995 WL 582051 (BIA 1995) 27, 28, 36

Matter of Yanez-Garcia, 23 I. & N. Dec. 390, 2002 WL 993589 (BIA 2002) 37

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) 14

NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) 43

TABLE OF AUTHORITIES – Continued

Page

Price v. United States, 537 U.S. 1152 (2003) 22

Smith v. United States, 508 U.S. 223 (1993) 15, 38

Taylor v. United States, 495 U.S. 575 (1990) 14, 40

United States v. Acosta, 124 F. Supp. 2d 631 (E.D. Wis. 2000) 19

United States v. Bass, 404 U.S. 336 (1971) 38

United States v. Booker, 543 U.S. 220 (2005) 40, 41

United States v. Bradley, 381 F.3d 641 (7th Cir. 2004) 20

United States v. Brown, 54 F.3d 234 (5th Cir. 1995) 5

United States v. Contreras, 895 F.2d 1241 (9th Cir. 1990) 31

United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366 (1909) 42

United States v. Feld, 514 F. Supp. 283 (E.D.N.Y. 1981) 18

United States v. Garnett, 243 F.3d 824 (4th Cir. 2001) 20

United States v. Granderson, 511 U.S. 39 (1994) 38

United States v. Ibarra-Galindo, 206 F.3d 1337 (9th Cir. 2000), *cert. denied*, 531 U.S. 1102 (2001) .....*passim*

United States v. Jin Fuey Moy, 241 U.S. 394 (1916) 42

United States v. LaBonte, 520 U.S. 751 (1997) 22

United States v. LaFranca, 282 U.S. 568 (1931) 42

United States v. McLemore, 28 F.3d 1160 (11th Cir. 1994) 19

TABLE OF AUTHORITIES – Continued

Page

United States v. Palacios-Suarez, 418 F.3d 629 (6th Cir. 2005) ..... *passim*

United States v. Peralta-Espinoza, 413 F. Supp. 2d 972 (E.D. Wis. 2006) ..... *passim*

United States v. Pornes-Garcia, 17 F.3d 142 (2d Cir.), *cert. denied*, 528 U.S. 880 (1999) 12

United States v. Restrepo-Aguilar, 74 F.3d 361 (1st Cir. 1996) 27

United States v. R.L.C., 503 U.S. 291 (1992) 30

United States v. Rodriguez-Munoz, No. 04-11321, 2006 WL 1209382 (5th Cir. May 2, 2006) (unpublished) 5

United States v. Simon, 168 F.3d 1271 (11th Cir.), *cert. denied*, 528 U.S. 844 (1999) 26

United States v. Smith, 20 Fed. Appx. 258 (6th Cir. 2001) (unpublished) 20

United States v. Turley, 352 U.S. 408 (1957) 14

United States v. White, 969 F.2d 681 (8th Cir. 1992) 20

United States v. Wilson, 316 F.3d 506 (4th Cir.), *cert. denied*, 528 U.S. 844 (1999) 26

Young v. United States, 315 U.S. 257 (1942) 16

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 8 42

U.S. CONST. amend. V 42

TABLE OF AUTHORITIES – Continued

Page

STATUTES

8 U.S.C. § 1101(a)(43) ..... *passim*
8 U.S.C. § 1101(a)(43)(B) ..... *passim*
8 U.S.C. § 1325 ..... 3, 4
8 U.S.C. § 1325(a) 3
18 U.S.C. § 924(c) ..... *passim*
18 U.S.C. § 924(c)(1) 19, 20, 21
18 U.S.C. § 924(c)(1)(A) 7, 8, 19, 20, 21
18 U.S.C. § 924(c)(2) ..... *passim*
18 U.S.C. § 924(c)(3) 19
18 U.S.C. § 924(e) 14, 40
18 U.S.C. § 924(f) 23
18 U.S.C. § 924(g) 23, 24
18 U.S.C. § 924(h) 19
18 U.S.C. § 924(k) 24, 25
18 U.S.C. § 929(a) 31
18 U.S.C. § 1961(1) 23
18 U.S.C. § 3553(a)(6) 40
18 U.S.C. § 3559(c)(2)(H)(i) 25
18 U.S.C. § 3559(c)(2)(H)(ii) 25
18 U.S.C. § 3583(e)(2) 5
21 U.S.C. § 801 *et seq.* 1, 2, 6, 11, 33
21 U.S.C. § 802 *et seq.* ..... *passim*
21 U.S.C. § 802(6) 24

TABLE OF AUTHORITIES – Continued

Page

21 U.S.C. § 802(13) 26, 27, 28

21 U.S.C. § 841(b)(1) 27

21 U.S.C. § 844 ..... 17, 18, 20, 23

21 U.S.C. § 844(a) 7, 11, 17

21 U.S.C. § 851 21

21 U.S.C. § 851(a) 21, 22

21 U.S.C. § 951 *et seq.* 2, 6, 11, 25, 33

21 U.S.C. § 955 ..... 17, 18

28 U.S.C. § 991(b)(1)(B) 40

28 U.S.C. § 994(f) 40, 41

28 U.S.C. § 1254(1) 1

46 U.S.C. App. § 1901 *et seq.* 2, 6, 11, 25, 33

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6211, 102 Stat. 4181 (1988) 23

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6212, 102 Stat. 4181 (1988) 31, 33

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (1988) 32

Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, intro. comment., 110 Stat. 3807 (1996) 18

Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, § 2(c), 110 Stat. 3807 (1996) 18

Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(2), 104 Stat. 4978 (1990) 34

TABLE OF AUTHORITIES – Continued

Page

Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(5), 104 Stat. 4978 (1990) 34

Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4310 (1994) 19

Immigration and Nationality Act § 101(a)(43) 34

DEL. CODE tit. 16, § 4753 11

MASS. GEN. LAWS ch. 94c, § 34 12

PA. CONS. STAT. § 780-113(a)(16) 12

PA. CONS. STAT. § 780-113(b) 12

TENN. CODE § 39-17-418(a) 12

TENN. CODE § 39-17-418(c) 12

TEX. HEALTH & SAFETY CODE § 481.102(3)(D) 11

TEX. HEALTH & SAFETY CODE § 481.115(b) 11

W. VA. CODE § 60A-4-401(c) 12

WISC. STAT. § 961.41(3g)(c) 12

WYO. STAT. § 35-7-1031(c)(i) 12

OTHER

U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 ..... 2, 3, 5, 10, 28

U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, comment. (n.2) 2, 28

U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(a) 3

U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) 28